Supreme Court, U.S.
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No. 04 311

IN THE

Supreme Court of the United States

IN RE RESEARCH AIR, INC, CHARLES R. ARMENT, AND MICHAEL H. DITTON,

Petitioners,

v.

CATHY A. CATTERSON, CLERK OF THE COURT, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; HONORABLE GALE A. NORTON, SECRETARY OF THE INTERIOR, DEPARTMENT OF INTERIOR; DEPARTMENT OF INTERIOR; STEVE SMITH, WEST AREA DIRECTOR, OFFICE OF AIRCRAFT SERVICES; ROBERT GALLOWAY, AVIATION SAFETY MANAGER, OFFICE OF AIRCRAFT SERVICES; UNITED STATES OF AMERICA; AND HONORABLE RICHARD F. CEBULL, UNITED STATES DISTRICT COURT JUDGE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR CERTIORARI OR WRITS OF MANDAMUS AND PROHIBITION

MICHAEL H. DITTON
Petitioner, and Counsel of Record for Petitioners
Attorney at Law
2210 Bridger Drive
Bozeman, Montana 59715
(406) 587-7386

QUESTIONS PRESENTED

1. Whether Ninth Circuit Rule 27-10 that supersedes Federal Rules of Appellate Procedure ("FRAP") Rule 40(a)(1) violates 28 U.S.C. 46(c), 2071 and 2072 and 28 U.S.C. App. FRAP 47 by imposing a 14-day filing time limit on petitions for rehearing and rehearing *en banc* when an officer of the United States, a United States agency, and the United States are parties to original proceedings.

2. Whether the Ninth Circuit's five *Bauman* guidelines conflict with 28 U.S.C. § 1651 and this Court's precedent when applied to deny mandamus or prohibition writs to enjoin federal agency officers' *ultra vires* and unconstitutional actions, protect the appellate court's jurisdiction, command a lower court to decide a pending case pursuant to FRCP Rule 65 and 28 U.S.C. § 1657(a), and review unconstitutionality of district court local admission rules?

3. Whether Petitioners are entitled to relief pursuant to 28 U.S.C. § 1651(a) and Supreme Court Rule 20 to compel Respondent Clerk to file and distribute their Petition for Rehearing and Suggestion for Rehearing *En Banc*; compel Respondent District Court to decide the preliminary injunction motion; enjoin federal agency officers' *ultra vires* and unconstitutional actions; and, review unconstitutionality of district court local admission rules?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are:

RESEARCH AIR, INC., a corporation
CHARLES R. ARMENT, an individual
MICHAEL H. DITTON, an individual

as Petitioners,

CATHY A. CATTERSON, Clerk of the Court, United States Court of Appeals for the Ninth Circuit, in her official capacity
HONORABLE GALE A. NORTON, Secretary of the Interior, in her official capacity
DEPARTMENT OF INTERIOR a federal executive department
STEVE SMITH West Area Director, Office of Aircraft Services, in his official capacity
ROBERT GALLOWAY, Aviation Safety Manager, Office of Aircraft Services, in his official capacity
UNITED STATES OF AMERICA,
HONORABLE RICHARD F. CEBULL, United States District Court Judge, in his official capacity

as Respondents.

Pursuant to R.Sup.Ct. R. 29.1, Petitioners state there are no parent companies or subsidiaries of Petitioners.

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Petitioners respectfully pray that a writ of certiorari issue to review the orders of the Court of Appeals for the Ninth Circuit entered on May 17, 2004, April 5, 2004, and February 25, 2004. In addition, or alternatively, Petitioners respectfully pray under Rule 20 for writs of mandamus and/or prohibition against Respondents Clerk, District Court, and the federal agency respondents, in aid of this Court's appellate jurisdiction.

OPINIONS BELOW

The Court of Appeal's May 17, April 5, and February 25, 2004 unpublished orders are reprinted in the appendix at 1a, 28a, & 47a.

JURISDICTION

Jurisdiction in the District Court was invoked under 28 U.S.C. §§ 1331, 1346, 1361, 1491(a) (1), & 2201, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, et seq.. Jurisdiction in the Court of Appeals was invoked under 28 U.S.C. § 1651(a), and the judicial review provisions of the Federal Aviation Act, 49 U.S.C. § 46110, Independent Transportation Board Act, 49 U.S.C. § 1153, and the APA, 5 U.S.C. §§ 701-706. Jurisdiction in this Court to review the final decision of the Ninth Circuit is invoked under 28 U.S.C. § 1254,[1] and for the requested writs, 28 U.S.C. § 1651(a), 49 U.S.C. §§ 46110(e) & 1153, and R.Sup.Ct. Rule 20.

CONSTITUTIONAL PROVISION AND STATUTES

The Fifth Amendment, *United States Constitution,* states in pertinent part: "No person shall be...deprived of life, liberty or property without due process of law". 28 U.S.C. § 46(c) states:

> Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court *in banc* is ordered by a majority of the circuit judges of the circuit who are in active

[1]Because the Ninth Circuit failed to rule on Petitioners' timely Petition for Rehearing and Suggestion for Rehearing *En Banc*, filed March 22, 2004, the 90 day certiorari petition filing time remains tolled. FRAP Rules 35& 40(a)(1); R.Sup.Ct. R. 13. Alternatively, Petitioners are timely being within 90 days of the last order. *See Hibbs v. Winn*, 542 U.S. __ (2004) (briefing order left unresolved whether the court would modify its judgment so that petition for a writ of certiorari filed within 90 days of briefing order was timely emphasizing finality).

> service. A court in banc shall consist of all active circuit judges of the circuit.

The All Writs Act, 28 U.S.C. § 1651, provides that: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.". 28 U.S.C. § 1651(a). 28 U.S.C. § 1657 ("Priority of civil actions") is reprinted in the appendix at 152a. 28 U.S.C. App. Federal Rules of Appellate Procedure ("FRAP") Rule 35(c) "Time for Petition for Hearing or Rehearing *En Banc*" states: "A petition for a rehearing *en banc* must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.". FRAP Rule 40(a) (1) states:

> (1) Time. Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

Ninth Circuit Rule ("Cir.R.") 27-10 "Motions For Reconsideration" is reprinted in the appendix at 149a. Relevant portions of the Federal Aviation Act, 49 U.S.C.§§ 40101 & 46110; Independent Transportation Board Act, 49 U.S.C. §§ 1116 & 1153; and, the APA, §§ 551(6-10) & 554, 703 & 706 are reprinted in the appendix at pp.126-138a. The challenged local admission rule, L.R. 83, is reprinted in the appendix at p.146a.

STATEMENT OF THE CASE

Petitioner Arment, an American citizen, is a fully qualified Federal Aviation Administration ("FAA") licensed commercial pilot holding an FAA Federal Aviation Regulations Part 135 single pilot commercial operator's certificate with operating specifications for a specialized low-level commercial airplane flying business.[2] He is the president and sole owner of Research Air, Inc. that owns a Christen Husky two-seat airplane uniquely equipped to fly low-level wildlife,

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[2]The complaint allegations, taken as true, are at App. O, 82-110a and the Petition allegations are at App. J, 51-73a.

waterfowl, and fish tracking missions for the Department of the Interior's ("Interior") Fish and Wildlife Service ("FWS"), and for other federal agencies. Over the course of about 12 years he has made a large investment in his flying business—about $300,000—and make more competitive his commercial civil aviation business purchasing a two-seat airplane and modifying the airplane to include sophisticated radio frequency detection and global positioning system equipment. Mr. Arment and Research Air reside in Montana and flew interstate to Utah when hired by Interior to fly low-level (below 500 feet) endangered species tracking missions for the FWS Colorado River Fishery Project. Interior requires possession of an interagency pilot qualification card ("pilot card") in addition to FAA commercial operator (Part 135), airman, and medical certificates for contract pilots, 351 DM 3, ¶ 3.5D, and Mr. Arment has held such pilot card since 1982. Mr. Arment is a highly experienced well-respected low-level pilot with 28 years of flying experience. From 1992 through now in 2004 Petitioner Arment has never received any unsatisfactory marks on FAA or OAS flight evaluation checks.

Interior excluded Mr. Arment and Research Air from further commercial flight contracts on March 26 and 27, 2002 without any proper notice to them alleging they violated federal aviation regulation § 91.119(c) (App. at 58a) by flying too close to a powerline while flying low-level for Interior.[3] This affects at a minimum low-level flight contracts for Interior, Department of Agriculture, Forest Service, United States Navy, and the Coast Guard. Interior publicizes on the Internet lists of qualified contract pilots and aircraft (available at http://www.oas.gov/source). Interior requires all ordering offices to ensure a contract pilot possesses the Interior pilot card and is listed on the approved vendor and pilot lists before contract flights.[4] Unless Mr. Arment's and Research Air's names appear on Interior's approved vendor lists, they are automatically disqualified from contract award no matter how responsible they are. They

[3]OAS's rules require a flight check upon suspicion of unsafe piloting following an OAS "incident with potential", 351 DM 3, ¶ 3.4E. Interior refused to evaluate Mr. Arment by an OAS flight check after their alleged "incident with potential."

[4]This includes all low-level federal flight contracts Petitioners might bid or propose on. No card, no contract. State and tribal organizations that would hire pilots to fly low-level tracking missions aware of an Interior pilot card suspension would not hire the suspended pilot.

cannot fly for non-government entities that either require possession of the OAS card or cannot economically perform such contracts without concurrent federal contract flights. As a law-abiding entrepreneur Mr. Arment structured and developed his business based on governmental low-level flying contracts. His two-seat aircraft filled with sophisticated electronic gear cannot be used economically for other kinds of commercial flight operations. Interior's actions took his investment; he is out of business.[5]

Mr. Arment and Research Air filed suit in United States district court on July 2, 2003 against Respondents Norton, Smith, Galloway, Interior and United States. The complaint states ten counts including two *Bivens'* causes of action against defendants Smith and Galloway sued individually. Plaintiffs alleged defendants deprived Arment and Research Air of substantive and procedural due process and committed an unauthorized taking in violation of the Fifth Amendment, took unauthorized agency action and arbitrary and capricious agency action lacking substantial evidence, a rational basis and neutral and detached decisionmakers in violation of the APA. Plaintiffs alleged defendants had no lawful authority to impose and revoke the pilot card grounding them from commercial operations when they fully complied with the FAA aviation regulations and Interior had represented to them it had exemptions from those regulations, that defendants violated the Federal Aviation Act and regulations by unilateral determinations of FAA violations, and that defendants illegally suspended, excluded and *de facto* debarred Plaintiffs from federal government contracting. Plaintiffs moved for a temporary restraining order and a preliminary injunction the same day.

The district court denied the TRO on July 9, 2003, stating Plaintiffs failed to satisfy Rule 65(b) "because the facts set forth in their affidavit or verified complaint do not demonstrate 'immediate and irreparable injury, loss, or damage'. Instead, Plaintiffs detail events that happened a year ago or more." Respondent District Court also denied Plaintiffs' attorney Ditton's admission *pro hac vice* citing L.R. 83.3(e) (2) that excludes resident attorneys not members of the Montana State Bar.

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[5]Research Air cannot survive with less than 150 hours low-level flying per year and has only realized less than $3,400 since May 6, 2003. Expenses since January 1, 2003 are over $22,900. At this rate, Research Air is out of business.

Defendants filed a motion to dismiss for lack of subject matter jurisdiction and lack of personal jurisdiction over defendants Smith and Galloway. They asserted the Contract Disputes Act, Tucker Act, and APA barred Plaintiffs' causes of action. On September 25, 2003 they informed the district court they had no reply to Plaintiff's preliminary injunction motion supplement based on the Administrative Record. On September 29, 2003 Plaintiffs' attorney Ditton moved the district court to waive the local admission rules for his full admission. The district court never ruled on the preliminary injunction motion, never ruled on defendants' motion to dismiss, denied Mr. Ditton's admission *pro hac vice* or with waiver, permitted Plaintiffs' local counsel to withdraw, and ordered Mr. Arment and Research Air to either proceed *pro se* (leaving Research Air unrepresented) or discharge Mr. Ditton and retain new counsel).[6] Defendants never answered the complaint.

When the district court judge denied the motion for admission with waiver, he stated Mr. Ditton was a Montana resident, "had not taken and passed the Montana bar examination," and:

> An attorney who resides in Montana *must* be a member of the State Bar in order to practice in its federal courts. This is a simple rule. While Mr. Ditton's argument pertaining to the inequality of Local Rule 83.3's residency requirement of United States Attorneys and non-United States Attorneys is interesting, it will not be addressed here. A simple remedy is available to Mr. Ditton that would permit him to practice law in the State of Montana, and, thus, in Montana's federal courts—obtain a license to do so by successfully passing the Montana bar examination.

App. L at 75-77a (emphasis in original).[7] Respondent District Court on January 7, 2004 scheduled a hearing on Petitioners' local counsel withdrawal motion for January 30, 2004. App. K at 74a.

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[6]All of Mr. Arment's and Research Air's papers filed in the District Court were properly signed by local counsel, including the complaint, and the motion and supporting brief for preliminary injunction.

[7]Mr. Ditton cannot take and pass the Montana Bar Examination because Supreme Court of Montana refused to let him do so. He has done something about that. *See Ditton v. Supreme Court of Montana,* No. CV-04-27-H-CCL.

Petitioners then submitted their writs petition ("Petition") to the Ninth Circuit in overnight mail on January 29, 2004. App. J at 51a. Citing FRAP Rule 21 and 28 U.S.C. § 1651, they sought writs of prohibition and mandamus in aid of the circuit court's jurisdiction. Although Respondent Clerk received the Petition on January 30, 2004, with Petitioners' check in the amount of the $250.00 as payment for the original proceedings filing fee, Respondent Clerk did not docket their Petition until February 2, 2004. App. Q at 113a. On February 2, 2004 circuit number 04-70454 was opened. App. P at 111a. On February 6, 2004, circuit number 04-70572 was opened with the Petition filed therein as of February 2, 2004. App. H at 49a; Q at 113a. Only Petitioners' two-page supplement to motion for expedited consideration was filed in 04-70454 on February 9, 2004. App. P at 111a. Respondent Clerk then demanded Petitioners pay an additional $255.00 as an appeal filing fee for 04-70572 although Petitioners had not filed any notice of appeal. App. at 48a. Petitioners refused. When Mr. Ditton belatedly learned about this he promptly complained to the clerk's office, the staff attorneys' office, and the circuit executive. See App. B at 12a and 4-5a. After complaining to staff attorneys Deiss and Hale on February 24 and 25, 2004, a panel order drafted by a staff motions attorney/deputy clerk[8] denying the Petition was faxed to Mr. Ditton and defendants' counsel within two hours of his last conversation with Ms. Hale. Petitioners were never told that if they asked for urgent consideration by telephone of their motion for expedition the Petition itself would be decided in two hours.

Without ordering a response to the Petition from defendants the Court of Appeal's tersely denied the Petition and then stated all motions were denied as moot. The decision states only that Petitioners had not "demonstrated that this case warrants the intervention of this court by means of the extraordinary writ of mandamus. *See Bauman v. United States Dist. Ct.,* 557 F.2d 650 (9th Cir. 1977)." App. F at 47a. Respondent District Court still has not ruled on the July 2, 200 preliminary injunction motion.

Petitioners submitted a Petition For Rehearing and Suggestion For Rehearing *En banc* pursuant to FRAP Rules 35 and 40 on March 17, 2004 filed March 22, 2004. App. E at 29a. Respondent Clerk summar-

[8]App. F at 3a. This is apparent from the face of the order that states the court's word processing filename as "s:\MOATT\ panelord\2.04\cd\04-70454.wpd".

ily ruled the rehearings petition as untimely stating only that: "The petition for rehearing and suggestion for rehearing *en banc* is denied as untimely. See 9th Cir. R. 27-10.". App. D at 28a. A "Motions Attorney/Deputy Clerk" signed this order "For the Court" with "9th Cir. R. 27-7 and General Orders/Appendix A" appearing in her signature block. *Id.* Petitioners moved to vacate this order by motion filed April 17, 2004. App. C at 14a. This motion was summarily denied by order dated May 17, 2004. App. A at 1a. Respondent Clerk has not filed or distributed the Petition For Rehearing and Suggestion For Rehearing *En banc* to the court.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's 14 day rule violates FRAP Rules 35, 40(a) (1) & 47; 28 U.S.C. §§ 46(c), 2071 & 2702, this Court's precedent, and conflicts with all other circuit courts of appeals. Moreover, in this case, the 14-day rule results in fraud on the court. Petitioner's seek orders or writs from this Court to protect the Court's appellate jurisdiction to: have Respondent District Court decide Petitioner Arment and Research Air's preliminary injunction motion pending since July 2, 2003; have Respondent Catterson file and distribute Petitioners' rehearings petition; have Respondent Interior and its officials return Mr. Arment's pilot card, reinstate Mr. Arment and Research Air on Interior's qualified pilot and aircraft lists, and remove them from Interior's blacklists; restrain Interior from encroaching upon the exclusive jurisdiction of the Department of Transportation; and, invalidate or direct the Ninth Circuit to determine the constitutionality of, Respondent District Court's local admission rules.

I. THE COURT OF APPEAL'S 14-DAY FILING RULE:

A. VIOLATES FRAP RULES 35, 40(a) (1) & 47; 28 U.S.C. §§ 46(c), 2071 & 2702

The Court of Appeals denied Petitioners rehearing only by the authority of Cir.R. 27-10 that imposes the 14-day rule and states: "The rule applies to any motion seeking review of a motions panel order, either by the panel or *en banc*, and supersedes the time limits set forth in Fed. R. App. P. 40(a) (1) with respect to such motions. (new 1-1-04).". App. X at 146a. Not all writ petitions are decided by motions panels, some are decided by regular panels. *See Circuit Advisory Committee Note to Rules 21-1-4.* App. Y at 147a. If a

motion is decided by an opinion *en banc* review is available, yet not if a mandamus petition is summarily denied in an order.[9] Motions panels are not as deliberate as regular panels, are controlled or at least heavily influenced by staff attorneys and clerks, and decisions can be made by less than three judges. The Court of Appeal's reasoning that Cir.R. 27-10 pertaining to motions supersedes FRAP Rule 40(a) (1)'s filing time limits because the writ petition was denied by a motions panel is specious. Petitioners' rehearings petition clearly sought to correct errors of law and fact and inconsistencies with other circuits in the denial of their writs petition on the merits, and not once mentioned the denial of their motion for expedited relief. App. E at 29-46a. Having a motions panel review writ petitions does not mean ipse dixit a writ petition is a motion. To arrive at the Court of Appeal's result one has to distort the English language: "petition" means "motion"; "petition for rehearing" means "motion for reconsideration"; and, "review of a panel decision on the merits" means "review of clerk or motions attorney's order". This is wholly unjustified. *Missouri v. Jenkins,* 495 U.S. 33, 48 (1990) (important differences among "suggestion for rehearing *en banc*," "petition for rehearing" and "motion").

The Court of Appeal's claimed power to supersede the Federal Rules of Appellate Procedure is nonexistent. FRAP Rule 40(a) (1) plainly states Petitioners had 45 days within which to file a Petition for Rehearing and Suggestion for Rehearing *En banc*. These rehearing petitions are provided as a statutory right to Petitioners. 28 U.S.C. App. FRAP Rules 35 & 40. A statutory rule must be applied "according to its terms." *United States v. Ron Pair Enter., Inc.,* 489 U.S. 235, 241 (1989). The second sentence in Rule 40(a) (1) beginning with "but" plainly eliminates whatever authority a circuit court would otherwise have to reduce via circuit rule the 45 day time limit. The second sentence allows such reduction only in a court

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[9]9th Cir. Gen. Orders, ¶ 6.11, states:

The Clerk shall enter the receipt or filing of a suggestion for rehearing en banc of a motion previously considered by a motions panel and transmit two copies of it to the appropriate motions attorney for processing. The Clerk shall retain the remaining copies until further direction by a judge or motions attorney. ...If the motion was decided by opinion, copies of the suggestion will be circulated to all active judges. The suggestion shall be referred by the motions attorney to the panel which entered the order in issue.

order in a specific case. There was no such order in this case. Absent such order, Petitioners reasonably relied upon and fully complied with FRAP Rules 35 and 40(a) (1).

Assuming *arguendo* any ambiguity in Rule 40(a) (1) exists, the Notes of Advisory Committee on Rules, *1994 Amendments to the Federal Rules of Appellate Procedure Rule 40,* emphatically state:

> Although the first sentence of Rule 40 permits a court of appeals to shorten or lengthen the usual 14 day filing period by order or by local rule, the sentence governing appeals in civil cases involving the United States purposely limits a court's power to alter the 45 day period to orders in specific cases. If a court of appeals could adopt a local rule shortening the time for filing a petition for rehearing in all cases involving the United States, the purpose of the amendment would be defeated.

App. Z at 151a. These advisory committee notes are "entitled to great weight". *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.,* 345 U.S. 247, 261 (1953).

Thus, the Court of Appeals had no power to supersede the Federal Rules of Appellate Procedure. Its supercession rule violates 28 U.S.C. § 2701(a) ("Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title."); § 2072(b) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."); and, 28 U.S.C. App. FRAP Rule 47(a) (1) (circuit court local rules must be "consistent ... with Acts of Congress and rules adopted under 28 U.S.C. § 2072"); *see United States v. National City Lines, 334 U.S.* 573, 589 (1948) ("general power to supervise the administration of justice in the federal courts ... does not extend to disregarding a validly enacted and applicable statute or permitting departure from it"); *Schacht v. United States,* 398 U.S. 58, 64 (1970) (judiciary statute takes priority over the "procedural rules adopted by the Court for the orderly transaction of its business."); *Kovilic Constr. Co. v. Missbrenner,* 106 F.3d 768 (7th Cir. 1997) ("courts may not exercise their inherent powers in a way that actually conflicts with constitutional or statutory provisions," *citing Bank of Nova Scotia v. United States,* 487

U.S. 250, 254 (1988), and 28 U.S.C. § 2072(b)). Local court rules that conflict with the FRAP are void. 28 U.S.C. § 2071.[10]

The Court of Appeal's rule also conflicts directly with 28 U.S.C. § 46(c) as authoritatively interpreted by this Court. *In Western Pacific, supra,* the Court applied 28 U.S.C. § 46 and reversed a panel per curiam decision striking a litigant's rehearings petition "as being without authority in law or in the rules or practice of the court"). 345 U.S. at 261 This Court stated that parties appearing before the Court of Appeals had "the right to know the administrative machinery that will be followed" in processing rehearing and *en banc* petitions. The Court also stated:

> We hold that the statute does not compel the court to adopt any particular procedure governing the exercise of the power; but whatever the procedure which is adopted, it should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it; and further, whatever the procedure which is adopted, it should not prevent a litigant from suggesting to those judges who, under the procedure established by the court, have the responsibility of initiating a rehearing *en banc*, that his case is an appropriate one for the exercise of the power.

345 U.S. at 267-68. *See Jenkins, supra,* 495 U.S. at 48 ("Regular adherence to published rules of procedure best promotes the principles of fairness, stability, and uniformity that those rules are designed to advance."). Here, the Court of Appeal's 14-day filing time rule cut off from the entire court Petitioners' suggestion, including their fraud on the court allegations, that *en banc* rehearing was appropriate. When Petitioners moved to vacate the filing denial order the Court of Appeals (probably the deputy clerk) again adamantly denied review and peremptorily told Petitioners "no further filings" would be accepted. (So much for the logic of a motion for reconsideration available after denial of a motion).

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[10]Cir.R. 27-10 violates 28 U.S.C. § 2071(b) for failure to give "appropriate public notice and an opportunity for comment" that writ petitions are motions, rehearings petitions are "motions for reconsideration," 45 days is 14 days and FRAP 35 and 40 petitions for denial of writ petitions are eliminated.

The Court of Appeal's decision conflicts directly with *Western Pacific Railroad, supra*, by preventing Petitioners from suggesting to the judges, who under the procedure established by the circuit court have the responsibility of initiating a rehearing *en banc*, that their case is an appropriate one for the exercise of the power, and by curtailing its use indiscriminately.[11] *See William H. Banks Warehouses, Inc. v. Watt,* 205 F.2d 44 (9th Cir.) (*per curiam*) *cert. den.,* 74 S.Ct. 43 (1953) (vacating panel denial of rehearing *en banc* upon rehearing petition filed within 25 days without determination by the active judges of the court).

Petitioners had no actual notice or knowledge that their rehearings petition filed on March 22, 2004—within 45 days of February 25, 2004—would be untimely, or that FRAP rehearing petitions had been prohibited.[12] No FRAP Rule 21 local rule warned Petitioners that FRAP rehearing petitions must be filed within 14 days, not 45 days.[13] Nonetheless, the Court of Appeals applied its local rule supplementing FRAP Rule 27 pertaining to motions to transform a FRAP rehearings petition into an motion that could only be recon-

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[11]The Ninth Circuit's *en banc* rehearing procedures were discussed in *Calderon v. Thompson*, 523 U.S. 538, 550, 552 (1998).

[12]When noticing for comment proposed amendments to Cir.R. 27-10, the Ninth Circuit created new subparagraphs (a) and (b) to this circuit rule and deleted from the categories of motions pertaining to a court order "rehearings...entered by a motions panel must be filed within 14 days of the date of the order," under new (a) "Filing For Reconsideration". By removing the reference to "rehearings" from "filing for reconsideration" the Ninth Circuit actually reinforced the natural and logical conclusion that rehearing petitions are not motions for reconsideration of an order. New (b) "Court Processing" states the language: "This rule applies to any motion seeking review of a motions panel order, either by the panel or *en banc*, and supersedes the time limits set forth in Fed.R.App.P. 40(a) (1) with respect to such motions.". App. V at 144a. This notice of proposed amendments does not notice any proposed amendment to FRAP Rules 21, 35 or 40. Id.

[13]Cir.R. 21-1, "Extraordinary Writs," states: "Petitions for extraordinary writs shall conform to and be filed in accordance with the provisions of FRAP 21(a).". Recent Ninth Circuit decisions permitting FRAP 35 & 40 rehearing petitions in mandamus proceedings include *Ellis v. United States District Court*, 294 F.3d 1094, 1099-1100 (9th Cir. 2002), *withdrawn*, 313 F.3d 1094 (9th Cir. 2002), rev'd on rehearing *en banc*, 356 F.3d 1198 (9th Cir. Feb. 4, 2004) (United States real party in interest); *Miller v. Gammie*, 335 F.3d 889, 895 (9th Cir. 2003) (*en banc*) (Nevada state respondent); *McClatchy Newspapers , Inc. v. United States District Court,* 288 F.3d 369 (9th Cir. 2002) (United States a named real party in interest).

sidered through a motion filed within 14 days of February 25, 2004, or by March 10, 2004. That violates the aforementioned statutes, and also FRAP Rule 47(b) that states:

> No sanction or other disadvantage may be imposed for non-compliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Following the Court of Appeal's reasoning to its logical conclusion, denials or grants of writ petitions by order cannot be reheard at all pursuant to a FRAP Rule 35 or Rule 40 rehearing petition, only by Cir.R. 27-10 motions for reconsideration that are not circulated to all Ninth Circuit judges in active service. The Court of Appeals arbitrarily cut off an entire class of cases—writ petitions decided by motions panels—from panel rehearing or *en banc* review, limited panel rehearings or the opportunity for *en banc* review to only those writ petitions fortuitously decided by a regular panel, while exempting appeals treated as mandamus petitions since they are not considered by motions panels, *see e.g., Miller, supra*, 335 F.3d at 895 (treating notice of appeal where appellate jurisdiction was lacking as a petition for a writ of mandamus); *National Org. for Reform of Marijuana Laws v. Mullen,* 828 F.2d 536, 541 (9th Cir. 1987) (court has discretion to treat appeal as petition for writ of mandamus). No case bifurcation or demand for additional filing fees occurred in those cases.

Eliminating rehearings and *en banc* review makes impotent the Court of Appeal's extraordinary writs arsenal. Egregiously wrong decisions such as that presented here are held uncorrectable because of an ironclad, heretofore unrevealed, 14-day rule that jettisons the safety valve function of FRAP Rules 35 and 40. *See Mariscal-Sandoval v. Ashcroft,* 370 F.3d 851, 856 (9th Cir. May 28, 2004) (refusing to dissolve removal stay immediately upon filing opinion denying petition for review because "Mariscal-Sandoval still retains the ability to petition this panel for rehearing, or to petition the court as a whole to review our decision *en banc*. Until any further petitions to this panel or the entire court are resolved, we cannot say that Mariscal-Sandoval has no probability of success on the merits.").

The Ninth Circuit's peculiar rules and actions violate the purpose of *en banc* review. *Western Pacific, supra,* 345 U.S. at 262 ("... there is no reason to deny the litigants any chance to aid the court in its effective implementation of the statute."); *Textile Mills Securities Corp. v. Commissioner,* 314 U.S. 326 (1941) (sustaining the authority of the courts of appeals to sit *en banc*, "Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases."); *Miller v. Gammie, supra,* 335 F.3d at 900 ("We must recognize that we are an intermediate appellate court. A goal of our circuit's decisions, including panel and *en banc* decisions, must be to preserve the consistency of circuit law. The goal is codified in procedures governing *en banc* review. *See* 28 U.S.C. § 46; Fed.R.App.P. 35.").

The Court of Appeal's drastically truncated filing time rule is further infelicitous given that this circuit covers the largest geographic territory in the nation, does not accept facsimile filings without special permission, regular first class mail time averages four days from Montana,[14] and even upon receipt the Respondent Clerk can delay filing papers, in this case by as much as three days. *See* App. I at 50a. Given these circumstances and the totality of the Ninth Circuit's caseload, rehearing is the only safety net for litigants before the court to point out the Court of Appeal's decisional inconsistencies and conflicts.

Through apparent over-reliance on staff attorneys and clerks, the Ninth Circuit precludes proper judicial consideration of a litigant's papers first at the motions panel level and then at the established *en banc* rehearing procedures. Factual circumstances presented in this case suggest that the Ninth Circuit impermissibly delegates judicial power to the Clerk and deputy clerk/staff attorneys neither appointed by the President nor confirmed by the Senate in derogation of Article II, *United States Constitution.* In this case staff attorneys used as clerks without authority apparently controlled the outcome of Petitioners' original proceedings. *See* App. P at 111a (stating: "Terminated

[14]Guam, the Northern Mariana Islands, Hawaii and Alaska are even more distant from the Clerk's office located in San Fransisco, California. The Ninth Circuit's 14-day rule effectively penalizes distant litigants and favors California litigants.

on the Merits after Submission Without Oral Hearing; Denied; Written, **Unsigned,** Unpublished. Ferdinand F. Fernandez, William A. Fletcher, Richard C. Tallman.") (emphasis supplied).

"If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76-81 (1982); see *Mariscal-Sandoval, supra,* 370 F.3d at 860 (Beezer, J., concurring) ("In addition to being unauthorized, the practice of permitting staff attorneys to grant stays of removal deprives the judges of this court of an important judicial obligation established by Congress for granting due process to an ever increasing number of undocumented aliens who seek to reside in the United States as permanent residents.").[15] Congress's authorization for employment of staff attorneys, 28 U.S.C. § 715, did not rewrite the *Constitution.* Congress limited the power and duties of clerks of court, 28 U.S.C. § 711 and prohibited clerks from practicing law, 28 U.S.C. § 955 ("The clerk of each court and his deputies and assistants shall not practice law in any court of the United States."). *See generally Gwaduri v. INS*, 362 F.3d 1144 (9th Cir. 2004) (discussing general orders and motions attorneys).

Not surprisingly, the Ninth Circuit's peculiar 14-day rule conflicts with every other federal circuit court of appeals that has considered the issue. *Mancuso v. Herbert,* 166 F.3d 97, 99-100 (2nd Cir. 1999) ("The Federal Rules of Appellate Procedure and this court's Local Rules make no mention of "motions for reconsideration." Therefore, we construe the government's motion for reconsideration as a petition for rehearing pursuant to Fed.R.App.P. 40 and Local Rule 40."); *Thomas v. United States,* 328 F.3d 305, 308 (7th Cir. 2003) ("For most purposes it makes sense to limit the phrase 'petition for rehearing' to a request for review of a panel's decision on the merits. Someone displeased with another kind of decision—for example, an order by a motions judge denying a request to file a brief longer than the cap in Fed.R.App.P. 32—files a motion for reconsideration. ...Consequently, a document (whether styled "petition for rehearing" or "motion for reconsideration") that seeks review by the court *en banc* will be distributed to all active judges."). *See Youghiogheny*

[15]Clerks and motions attorneys do not take the judicial oath in 28 U.S.C. § 453.

and Ohio Coal Co. v. Milliken, 200 F.3d 942, 952 (6th Cir. 1999), cert. den., 531 U.S. 818 (2000) ("...Rule 40(a) now grants all parties to a civil case in which the United States or a federal agency or officer is a party forty-five days from the entry of judgment to petition for rehearing,..."). This buried superseding rule also conflicts with all other circuit courts of appeal rules.[16]

B. CREATES TRAPS FOR THE UNWARY CAUSING PERNICIOUS EFFECTS

The Ninth Circuit's provincial rule creates traps for the unwary, calling for exercise of this court's supervisory powers. Any attorney or *pro se* litigant seeking information about writ petitions and petitions for rehearing would not logically look under circuit rules concerning motions when explicit rules exist, including circuit rules, for writ petitions, panel rehearing petitions, and petitions with suggestions for rehearing *en banc*. FRAP Rules 21, 35 or 40. There is no

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[16]The First, Second, Third, Seventh and Tenth Circuits have no rules contradicting or superseding FRAP Rule 40(a) (1) nor mention "reconsideration". The Third, Fourth, Fifth, Eighth, D.C. and Federal Circuit have no rules contradicting or superseding FRAP Rule 40(a) (1) and have specific reinforcing rules. 4th Cir.R. 40(c) states: "The Court strictly enforces the time limits for filing petitions for rehearing and petitions for rehearing *en banc*. The Clerk's Office will deny as untimely any petition received in the Clerk's Office later than 45 days after entry of judgment in any civil case where the United States, or an agency or officer thereof is a party, or 14 days after the entry of judgment in any other case.". 5th Cir.R. 35.4 states: "Any petition for rehearing *en banc* must be received in the clerk's office within the time specified in FED.R.APP.P. 40."; *see also* 5th Cir.R. 40.4. 5th Cir. R. 27.1 states: "The clerk's action is subject to review by a single judge upon a motion for reconsideration made within the 14 or 45 day period set by FED.R. APP.P.40.". 6th Cir.R. 27 (g) "Motion for Reconsideration" states: "A party may seek rehearing of a judgment of this Court pursuant to FRAP 40.". The Eighth Circuit allows reconsideration only of a procedural motion decided by a clerk or single judge decision. The Eleventh Circuit excludes from motions for reconsideration matters governed by FRAP 40, 11th Cir. R. 27-2 , and under FRAP Rule 40 states: "A petition for rehearing must be filed within 21 days of entry of judgment, except that a petition for rehearing in a civil case in which the United States or an officer or agency thereof is a party must be filed within 45 days of entry of judgment. Judgment is entered on the opinion filing date.". 11th Cir.R. 40-3. Fed.Cir.R. 27(l) ("Review or Reconsideration of the Order of a Single Judge or Panel of Judges") states: "Except for a dispositive order issued by a panel, which time will be governed by Federal Rule of Appellate Procedure 40(a) (1).". D.C. Cir.R. 35 states: "In all cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek panel rehearing or rehearing en banc is 45 days after entry of judgment or other form of decision.".

corresponding indication at all suggesting that in the Ninth Circuit, FRAP Rule 40(a) (1)'s 45 days means 14 days or that FRAP 35 and 40 do not apply to writ petitions. Litigants do not know in advance whether FRAP Rules 35 and 40 rehearing petitions are considered motions to reconsider subject to the 14-day rule. No statement in the Court of Appeals order denying the writ petition advised Petitioners that FRAP Rules 35 and 40 rehearing petitions had to be filed as "motions for reconsideration" and within 14, not 45 days.[17]

Petitioners' rehearings petition was received within the time established by published Ninth Circuit opinions interpreting FRAP Rule 40, *Bianchi v. Perry,* 154 F.3d 1023, 1024 (9th Cir. 1998) ("Because an officer of the United States was a party, the deadline for filing a petition for rehearing was 45 days from April 9, under Federal Rule of Appellate Procedure 40(a)."), and motions, *Bonin v. Calderon,* 59 F.3d 815 (9th Cir. 1995) ("To the extent that Bonin's motion requests correction of factual statements contained in our previous opinion, it is procedurally barred due to his failure to seek such corrections by means of a timely petition for rehearing in accordance with Federal Rule of Appellate Procedure 40.").

The internally and outwardly inconsistent Cir.R. 27-10 creates pernicious effects. Absent the peculiar and wrongheaded usurpation of FRAP Rule 40, Petitioners' rehearings petition would have been considered by all judges in accordance with the Court of Appeal's established procedure for *en banc* consideration. Shortening by two-thirds the time within which to petition for rehearing prejudices Petitioners by unfairly depriving them of any opportunity for *en banc* review, and also prejudices government attorneys and the solicitor general. Further, motions for reconsideration do not toll time within which to petition for certiorari to this Court.[18] The effect

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[17]As one Ninth Circuit judge (whose name was apparently taken in vain here) stated in a different context: "The result is nonsensical and certainly not "fully intelligible to those [ ]familiar with the case". *Hart v. Massanari,* 266 F.3d 1155, 1177-78 (9th Cir. 2001) (Kozinski, J.).

[18]Petitions for rehearing authorized by Rule 40(a) "toll[ ] the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing." *Jenkins, supra,* (*citing Dep't. of Banking v. Pink,* 317 U.S. 264 (1942)).

of the 14-day rule applied to a rehearing petition filed with 45 days potentially deprives Petitioners of their statutory certiorari rights in this Court, 28 U.S.C. § 2101, by eliminating tolling upon rehearing. Denying any rehearing affects the appellate jurisdiction of this Court. 28 U.S.C. § 2101.

C. AMOUNTS HERE TO FRAUD ON THE COURT

When docketing the Petition, Respondent Clerk impermissibly split one original proceeding into two cases, filing the Petition received January 30, 2004 on February 2, 2004 in docket number 04-70572 and filing Petitioners' February 5, 2004 supplement to their Petition on February 9, 2004 in docket number 04-70454. App. P & Q at 111a & 113a. Respondent Clerk then demanded payment of $255.00 in docket number 04-70572 as a filing fee apparently to maintain the Petition she had filed therein as an appeal. App. G at 48a. ($255 is the statutorily prescribed filing fee for an appeal from district court). When Petitioners refused to pay, having already paid the $250.00 original proceedings filing fee on January 30, 2004 (app. at 46a) that Respondent Clerk deposited in the court's bank accounts (app. at 12a), a clerk drafted an order for summary dismissal of Petitioners' original proceedings in docket number 04-70454 (app. F at 47a) that did not contain the Petition. After Petitioners complained, a deputy clerk/motions attorney issued the February 25, 2004 order (purportedly with the authority of a motions panel) faxing the document to Petitioners the same day on February 25, 2004 (app. at 22a), although what Petitioners had clearly sought in writing and in subsequent telephone calls was a ruling on their motion to expedite consideration, expressly provided for in Ninth Circuit's rules as a matter of right under 28 U.S.C. § 1657 (*See* Cir.R. 27-3) and because Respondent District Court was poised to rule on the local counsel withdrawal motion.

Fraud upon the court includes fraud by bribing a judge, or tampering with a jury, or fraud by an officer of the court. *See* 12 James Wm. Moore et al., *Moore's Federal Practice,* ¶ 60.21 [4][a], ¶ 60.21[4][a], [b] (3d ed. 1999) ("... a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication."). Clerks are officers of the court. 28 U.S.C. §§ 221, 222, 711, 715, & 951. False statements and willful concealment

occurred in the Ninth Circuit by the clerks "processing" Petitioners' papers for whom Respondent Clerk is responsible. The elements of fraud on the court are satisfied here. Concealing the original proceedings Petition and accompanying exhibits from Ninth Circuit judges was deceptive. Representing a separate appeal was docketed was false. The record indisputably and conclusively shows that: (1) Petitioners filed no appeal in the district court and submitted only one petition in the circuit court for filing as an original proceeding received by the Clerk's office on January 30, 2004 (App. at 10a); (2) the case containing Petitioners' Petition and exhibits was not "terminated" until February 27, 2004 (App. Q at 114a); (3) Petitioners' papers therein were never transferred to 04-70454 (*id.*); (4) the circuit court summarily denied any relief in the latter case on February 25, 2004 (App. F at 47a); and, (5) thereafter upon Petitioners' complaints (unanswered) their rehearings petition and motion to vacate were summarily rejected (App. D at 28a). According to Respondent Clerk Catterson's docket, the only document in the file in 04-70454 when Petitioners' mandamus and/or prohibition writs petition was denied on February 25, 2004 was the February 4, 2004 two-page supplement. The Petition and accompanying appendix of court and administrative record excerpts filed in accordance with circuit rules were buried in 04-70572. App. Q at 113a. The terms "shell game" and "hide and seek" spring to mind here. Denying as untimely rehearings petition that assert fraud on the court using an illegal 14-day rule appears retaliatory and designed to cover-up misconduct.

There is no justification for this conduct. Although Petitioners' attorney Ditton wrote and sent three letters to the clerks, including one personally addressed to Respondent Catterson, none were answered or otherwise responded to, and any "mistake" was never corrected after abundant notice and time. These acts prejudiced Petitioners. *Supra*, at pp. 10, 13 & 16. Bifurcation of the original proceeding deprived reviewing judges of almost all of Petitioners' papers in the reviewed case. Little imagination is required to picture circumstances where judges presented with a separate appeal and only two pages of a supplemental pleading deny mandamus routinely. *Bauman,* at 656. The false representation of two cases instead of one is also material because numbers of cases and dispositions are reported to the Administrative Office of the U.S. Courts and may be reported to Congress.

The February 25, April 5, and May 17, 2004 orders amount to fraud on the court demanding equitable intervention from this Court, or at least an order directing the Ninth Circuit to confront and decide the issue forthrightly, *i.e.*, to clean up its own house. In *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238 (1944), this Court stated the importance of exercising this equitable power:

> Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Id. at 246. Denial of any relief to Petitioners as reflected in the May 17, 2004, April 5, 2004 and February 25, 2004 orders is manifestly unconscionable. *Hazel-Atlas, supra,* at 244-45. The false statements regarding presence of an appeal and apparent willful concealment of the Petition and Appendix was aimed at the court and relief is necessary to prevent a "grave miscarriage of justice". *Id.* at250 ("the Circuit Court on the record here presented had both the duty and the power to vacate its own judgment and to give the District Court appropriate directions."); *United States v. Beggerly,* 524 U.S. 38, 47 (1998); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991) (inherent "power to vacate judgments on proof that a fraud on the court has been committed.").

II. THE NINTH CIRCUIT'S *BAUMAN* GUIDELINES CONFLICT WITH 28 U.S.C. § 1651 WHEN USED HERE:

The Ninth Circuit denied Petitioners any relief stating only Petitioners had "not "demonstrated that this case warrants the intervention of this court by means of the extraordinary writ of mandamus" citing *Bauman v. United States*, 557 F.2d 650 (9th Cir. 1977). App. F at 47a. Since *Bauman* is the cited authority for denying Petitioners' writs, *Bauman* must supply the court's reasoning through applica-

tion of each of guidelines enunciated therein to justify exercising sound discretion to deny Petitioners any relief. In this case, however, resort to Bauman amounts to a complete failure to exercise sound discretion in accordance with the usages and principles of law. Relief from this Court is therefore necessary and appropriate. R.Sup.Ct. Rule 20.1.

Bauman sets forth five guidelines limiting exercise of the Ninth Circuit's sound discretion to grant mandamus relief:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal...(3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

557 F.2d at 654-55. The Ninth Circuit weighs the five factors together. *Id.* at 655; *Washington Pub. Util. Group v. United States District Court,* 843 F.2d 319, 325 (9th Cir. 1987).

The first *Bauman* guideline would apply only if the Ninth Circuit was influenced by a pending docketed appeal (discussed *supra* in part I.C as fraud on the court), although not by Petitioners, but wrongfully by Respondent Clerk, apparently practicing law without a license. *See Matter of Sandahl,* 980 F.2d 1118 (7th Cir. 1992) (lack of an adequate remedy by way of direct appeal or otherwise amounts to irreparable harm). The second guideline was clearly addressed in the Petition and was uncontested in the circuit court. The third guideline was satisfied with respect to the Respondent District Court who prioritized a local counsel withdrawal motion over deciding the preliminary injunction motion in violation of 28 U.S.C. § 1657, that would have obviated local counsels' withdrawal motion, and otherwise obviously could not apply to the federal respondents. If the Ninth Circuit meant to say that because there was no district court order denying the preliminary injunction motion this third guideline could not be satisfied, of course that would be unsound *per se*. The fourth guideline is similarly inapplicable and in any event was satisfied by Respondent District Court's persistent refusal to rule, at least

on a daily basis after September 25, 2003 when defendants stated they had no further reply.[19] The fifth guideline is also the Ninth Circuit's own creation and hardly justifies denying Petitioners any relief. The necessary assumption from the February 25, 2004 denial order "weighing the [*Bauman*] factors together"— that a district court's refusal to rule or federal officers' violations of the Constitution is not "new and important" not only denigrates district courts and federal agencies, it is also absurdly unsound considering the purposes of extraordinary writs.

The traditional test for granting all writs relief was recently restated in *Cheney v. U.S. District Court*, 542 U.S. __ (2004):

> As the writ is one of "the most potent weapons in the judicial arsenal," *Id.*, at 107, three conditions must be satisfied before it may issue. *Kerr v. United States Dist. Court for Northern Dist. of Cal.,* 426 U. S. 394, 403 (1976). First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," *ibid.*—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process, *Fahey, supra,* at 260. Second, the petitioner must satisfy " 'the burden of showing that [his] right to issuance of the writ is "clear and indisputable." ' " Kerr, supra, at 403 (quoting Banker's Life & Casualty Co., supra, at 384). Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *Kerr, supra*, at 403 (citing *Schlagenhauf v. Holder,* 379 U. S. 104, 112, n. 8 (1964)). These hurdles, however demanding, are not insuperable...

Slip op. at 9-10. Instead of applying the traditional test, the Ninth Circuit mechanistically used an inapplicable five-part test throwing up artificial barriers to litigants seeking relief from oppressive governmental acts and a lower court of right and justice's adamant refusal to rule. *See Maloney v. Plunkett*, 854 F.2d 152, 155 (7th Cir. 1988) (writ's "proper use cannot be wholly reduced to formula"). Of the five Bauman guidelines, only the first conforms to the traditional

[19]Petitioners interpreted this as meaning there had to be other violations by Respondent District Court and Petitioners then knew of no such violations.

test as enunciated by this Court. *See Rees v. United States District Court*, 572 F.2d 700, 702 & n.8 (9th Cir. 1978) (noting that the only *Bauman* guideline the Supreme Court identifies as a condition for mandamus relief is an unavailable or inadequate ordinary appeal after final disposition of the case in the district court). The *Bauman* formula applied here effectively eliminates any consideration of whether a petitioners' right to relief is "clear and indisputable" or "appropriate under the circumstances".[20]

The appellate court refused even to consider prohibiting Interior officials acting without any statutory authority and in conflict with Congress's exclusive grant of all decisionmaking powers over aviation safety, commerce, and economic regulation to Transportation, although the Interior officials' *ultra vires* acts deprived Mr. Arment and Research Air of their constitutional due process rights (that Transportation provides) .[21] That affected circuit court prospective and concurrent or exclusive statutory judicial review jurisdiction under the Federal Aviation Act and Independent Safety Board Act. 49 U.S.C. § 46110 & § 1153.[22]

"[W]hether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of the act." *Marbury v. Madison,* 5 U.S. 137, 165-66, 170 (1803) (distinguishing between "acts [which] are only politically examinable," and "acts [which the official] is directed by law to do

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[20]To Petitioners' knowledge, the Court has not previously ruled on the Ninth Circuit's Bauman formula. *See In re Cement,* 459 U.S. 1191 (1983), *aff'g for lack of a quorum,* 688 F.2d 1297 (9th Cir. 1982), .

[21]This is not the first time Interior has proclaimed that over aviation matters they are a "law unto themselves". *See Dynamic Aviation v. Interior,* 898 F. Supp. 11 (D.D.C. 1995) (involving OAS pilot card and denying Interior's motion to dismiss).

[22]Department of Transportation provides full due process protections to pilots and airlines accused of federal aviation regulation violations. *See e.g., Jifry v. FAA* , 370 F.3d 1174 (D.C.Cir. 2004) (Homeland Security department's terrorist designation subordinate to Transportation's final authority over pilot certificates); *Coalition of Airline Pilots v. FAA,* 370 F.3d 1184 (D.C.Cir. Jun. 14, 2004) (civilian pilots); *Zephyr Aviation, L.L.C. v. Dailey*, 247 F.3d 565 (5th Cir. 2001) ("availability of the FAA's appeal structure to remedy that deprivation after the fact provided sufficient process to protect Zephyr's procedural due process rights."); *GATX/Airlog Co. v. United States,* 234 F.3d 1089, n.4 (9th Cir. 2000) (air carrier had remedy to challenge merits of FAA airworthiness directive including judicial

[and which affect] the absolute rights of individuals"— the latter are answerable by a writ of mandamus); *Norton v. Southern Utah Wilderness Alliance,* 542 U.S. __ (Jun. 14, 2004) (comparing APA § 706(1) to 28 U.S.C. § 1651(a)). APA § 706(1) applies to original proceedings in the circuit courts of appeal. Relief was required there because the federal agency and officers acted without any statutory authority. *Leedom v. Kyne,* 358 U.S. 184, 190 (1958) (injunctive remedy to enforce a "clear" statutory right violated by an agency was available in federal court because the Court "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691 (1949) (an executive officer may be enjoined from continuing to enforce a constitutionally infirm statute or regulation).

Formalistic use of the five *Bauman* guidelines as a steep threshold Petitioners could never surmount also conflicts with other circuit courts of appeal. *See Hunt v. Commodity Futures Trading Comm.*, 591 F.2d 1234, 1236 (7th Cir. 1979) ("a court will ... intervene immediately"); *Rhode Island Dep't. of Env. Mgt. v. United States,* 304 F.3d 31, 44-45 (1st Cir. 2002) ("In clear cases, the petitioning party could also seek a writ of prohibition as necessary or appropriate in aid of the appeals court's jurisdiction.") (citations omitted); *In re Perry,* 859 F.2d 1043, 1046-50 (1st Cir. 1988) (ALJ's interference with petitioners' First Amendment rights so far "exceed[ed] the proper scope of [his] authority as to constitute a usurpation of power", granting prohibition). Justifying abstention from All Writs

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review in court of appeals); *Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 213 (9th Cir. 1995) (special operating rules for aircraft operators in Hawaii); *Foster v. Skinner,* 70 F.3d 1084 (9th Cir. 1995) (clear authority establishes the FAA Administrator, in his discretion, may suspend and revoke pilot certificates); *Las Vegas Hacienda, Inc. v. CAB*, 298 F.2d 430, 432 (9th Cir.), *cert denied*, 369 U.S. 885 (1962) (economic regulation). Interior provides no such due process. Judicial review of Transportation final orders is reserved to the circuit court of appeals. 49 U.S.C. § 46110. Similarly, setting standards and defining terms for reporting aviation incidents, and when and how such reports are rendered, are exclusively within the jurisdiction of the National Safety Transportation Board, 49 U.S.C. § 1116(b), with judicial review, again, exclusively at the circuit courts of appeals. 49 U.S.C. §§ 1153 & 1131(a)(1)(A) & (F). *See Gibson v. NTSB*, 118 F.3d 1312, 1314-15 (9th Cir. 1997) (*per curiam*); *Graham v. Teledyne-Continental Motors,* 805 F.2d 1386, 1389 (9th Cir. 1986).

Act jurisdiction using *Bauman* demonstrates a contracted view of the Court of Appeal's original, appellate, concurrent and prospective jurisdiction. *Compare American Rivers v. FERC,* 170 F.3d 896, 897 (9th Cir. 1999) (denying relief because "appellate jurisdiction is dependent on the issuance of an order by FERC" and the agency's "[m]ere inaction...cannot be transmuted by petitioners into an order rejecting their petition.") with *In re American Rivers and Idaho Rivers United v. FERC,* __ F.3d __ (D.C. Cir. Jun. 22, 2004) (We have jurisdiction to entertain the request in order to safeguard our prospective jurisdiction under the Federal Power Act, 16 U.S.C. § 825l(b)", same petitioner earlier denied by Ninth Circuit).

A. TO NOT COMPEL PRELIMINARY INJUNCTION RULING

Plaintiffs have a "clear and indisputable right" to the relief sought. *Kerr, supra; Mallard v. United States District Court,* 490 U.S. 296, 309 (1989) ("District Court plainly acted beyond its "jurisdiction" as our decisions have interpreted that term, for, as we decide today, § 1915(d) does not authorize coercive appointments of counsel."); *Roche v. Evaporated Milk Assoc.,* 319 U.S. 21, 25 (1943) ("Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal."). Courts must decide cases according to statutes enacted by Congress. *United States v. Schooner Peggy,* 5 U.S. (1 Cranch) 103, 109 (1801); *Miller v. French,* 530 U.S. 327, 344-47 (2000). Refusal to exercise discretion compelled by statute is a "clear abuse of discretion.". *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 383 (1953); *In re Vargas,* 723 F.2d 1461, 1467 (10th Cir. 1983), *cert. denied,* 469 U.S. 819 (1984) (The right to a writ is "clear and indisputable" when the petitioner can show "a judicial usurpation of power or a clear abuse of discretion", *citing Mallard*).

Refusal to decide deprives Petitioners of their FRCP 65 remedy, their 28 U.S.C. § 1657 right of priority (App. AA at 149a), and their appeal rights under 28 U.S.C. § 1291. *See Williams v. Simons,* 355 U.S. 49 (1957) (*per curiam*) (citing § 1657 and discussing that Court's order to show cause why writ should not issue for district court's refusal to decide state's preliminary injunction motion). *See also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) ("When enforcement actions are imminent ... there is no adequate

remedy at law."); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497-98 (2001); *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077 (D.C. Cir. 2001) ("But, whether or not appellant has suffered irreparable injury, if it makes out its case under the APA it is entitled to a remedy.") (footnote omitted).[23]

By using *Bauman* guidelines to deny clear and indisputable rights to mandamus and prohibition relief the Ninth Circuit stood the All Writs Act standard on its head. This crabbed interpretation of all writs discretion that eliminates judicial power to compel a trial court "to exercise its authority when it is its duty to do so" directly conflicts with *Ex Parte Bradstreet*, 32 U.S. (7 Pet.) 634, 647 (1833); *Life & Fire Ins. Co. v. Wilson*, 33 U.S. (8 Pet.) 291, 301-304 (1834); *Ins. Co. v. Comstock*, 83 U.S. 258, 270-71 (1872); *McClellan v. Carland*, 217 U.S. 268, 279-282 (1910); *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1956); see *Thermtron Prod,, Inc. v. Hermansdorfer,* 423 U.S. 336, 352 (1976); *Colorado River Water Conserv. Dist. v. United States,* 424 U.S. 800, 813 (1976); *see also Cromoglass Corp. v. Ferm*, 500 F.2d 601 (3rd Cir. 1974) ("If the Rule 65 hearing resulted in a denial of an injunction, Cromaglass indeed would have an appealable order.").

Indisputably, the district court's refusal to rule affects the circuit court's appellate jurisdiction. "It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure." *Mayo v. Lakeland Highlands*

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[23]In any event, Mr. Arment and Research Air satisfied the irreparable injury standard. *See e.g., Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139, 1144 (D.C. Cir. 1989) (stigmatization from allegations of unsafe aircraft); *Coteau Properties Co. v. Interior,* 53 F.3d 1466 (8th Cir. 1995) (delay, denial or suspension of contractor's Interior mining permits "would clearly cause Coteau serious difficulties in meeting its contractual obligations, if not make it impossible to meet them."); *Mendenhall v. NTSB*, 92 F.3d 871, 876 (9th Cir. 1996) ("Contrary to the FAA's assertions, ten days without a license is not 'a reasonable period of time,' when one's livelihood depends upon it."); *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998) (if prejudice was required plaintiffs due process violation showing sufficed); *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144 (10th Cir. 2001) (*ultra vires* acts effectively revoking peace officer's certificate, foreclosing employment opportunities by circulating unproven damaging information); *Sloan v. HUD,* 231 F.3d 10 (D.C. Cir. 2000) (economic losses, professional indignities, and injuries to reputations by official record suggesting "'serious irregularities' in their business dealings with the Government").

Canning Co., 309 U.S. 310, 316 (1940). There was no such compliance in this case. Nor is there anyway to correct the omission on appeal. *See Casad v. HHS*, 301 F.3d 1247, 1254 (10th Cir. 2002) (rejecting appeal for § 1657(a) violation; "The district court has resolved the case; this court can provide no relief for any alleged delay."). Given the lower and circuit courts' rulings, through no fault of their own, Petitioners are placed in judicial purgatory for there is no appealable order in the underlying case.

B. TO NOT RESTRAIN FEDERAL OFFICERS ACTING *Ultra vires* AND UNCONSTITUTIONALLY

Mr. Arment and Research Air sought injunctive relief in district court against the federal defendants on constitutional and APA grounds. App. O at 82-110a. They claimed that Interior had no statutory authority to unilaterally apply the Federal Aviation Regulations to ground them from civil commercial aviation operations. 49 U.S.C. § 40101(a) (1)-(4) (c) & (d) (84a & 93a); *United States v. Varig Airlines,* 467 U.S. 797, 813-14 (1984) (Federal Aviation Act vested in DOT "all regulatory authority over aviation safety").[24] Their right to equitable relief against the federal officer respondents was (and is) clear and indisputable. *Philadelphia Co. v. Stimson,* 223 U.S. 605, 620 (1912); *Stark v. Wickard*, 321 U.S. 288, 310 (1944); *Bell v. Hood,* 327 U.S. 678, 682-83 (1946); *Joint Anti-Fascist Ref. Comm. v. McGrath,* 341 U.S. 123, 161, 173 (1951); *see Greene v. McElroy,* 360 U.S. 474 (1959) (reversing *ultra vires* revocation of a federal security clearance permitting a professional aeronautical engineer to work on classified government aircraft projects); *Bell v. Burson*, 402 U.S. 535 (1971) (cannot suspend driver's license without a hearing on fault); *Barry v. Barchi*, 443 U. S. 55, 63-64 (1979) (state statute without prompt post-

[24] *See DOT v. Public Citizen*, 541 U.S. __, (Jun. 14, 2004); *Arapahoe Cnty. Pub. Airport Auth. v. FAA*, 242 F.3d 1213 (10th Cir. 2001) (City airport authority's proclaimed "safety" and "civil aviation needs" a factual matter for the FAA); *Tempe v. FAA*, 239 F. Supp.2d 55 (D.D.C. 2003) (City could not have violated federal law when FAA, not City, had "obligation under federal law to perform a conformity determination"); *Fairview v. Transportation*, 201 F. Supp.2d 64 (D.D.C. 2002) (claim that operation of an aircraft below 1,000 feet over any congested area of a city, town, or settlement prohibited by 14 C.F.R. § 91.119 "vested exclusively in the courts of appeals"); *United States v. Red Frame Parasail*, 160 F. Supp.2d 1048 (D.Ariz. 2001) (accepting United States' position FAA regulates airspace below 500 feet AGL); *supra*, n. 22.

deprivation hearing unconstitutional as applied to racetrack trainer suspended for 15 days).

Respondent Interior's sanctions are plainly illegal and proffered contract defenses inapplicable. A federal agency may not punish a government contractor through the guise of contract administration. *L.P. Steuart & Bros., Inc. v. Bowles*, 322 U.S. 398 (1944) (government contracting suspension cannot be used as punishment); *Commercial Drapery Contr., Inc. v. United States*, 133 F.3d 1, 6 (D.C. Cir. 1998) ("An agency may not impose even a temporary suspension without providing the 'core requirements' of due process: adequate notice and a meaningful hearing."); *see Custer Cnty. Action Assoc. v. Garvey*, 256 F.3d 1024, 1042 (10th Cir. 2001) ("Unauthorized" conduct in the takings context equates to the *ultra vires* actions of an agency, *i.e.*, action explicitly prohibited or outside the normal scope of agency responsibilities.").

FAA's authority is paramount.[25] *Varig, supra.* "[A]n agency may not bootstrap itself into an area in which it has no jurisdiction." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (*citing Federal Maritime Comm'n. v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973); *SEC v. Sloan*, 436 U.S. 103, 119 (1978) (same); *cf. Adamo Wrecking Co. v. United States*, 434 U.S. 275, 288, n.5 (1978) (rejecting "Administrator's unexplained exercise of supposed authority")). Even when Congress expressly delegates authority to Interior involving aviation, Congress provides FAA has the final authority. *See U.S. Air Tour Assoc. v. FAA*, 298 F.3d 997 (D.C. Cir. 2002); *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998). Agency action taken without statutory authority is plainly illegal. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902); *Larson, supra*, 337 at 701-702; *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 237-38 (1968) ("We deal with conduct of a local Board that is basically lawless."); *Stark, supra*, 321 at 310-11; *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958) (*per curiam*); *Louisiana Pub. Serv. Comm. v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act ... unless and until Congress confers power upon it."); *Bowen v. Michigan Academy of Family Physi-*

[25]FAA's annual and continual certification of Mr. Arment as a safe pilot and Research Air's part 135 operating certificate constitutes FAA's final binding determination in this matter that Interior illegally refuses to accept.

cians, 476 U.S. 667, 681 (1986); *see Dart v. United States,* 848 F.2d 217, 224 (D.C. Cir. 1988) ("When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority, ...the Veterans' Administrator cannot issue oil drilling permits—nor can the Secretary of Labor rescind television licenses—and expect to escape judicial review by hiding behind a finality clause.").

Petitioners' right to relief under the APA was equally clear. 5 U.S.C. §§ 703, 706; *TVA v. Hill,* 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.", *citing Marbury, supra*, 1 Cranch at 175). *See United States v. Seatrain Lines,* 329 U.S. 424, 432-33 (1947) (no authority to alter carriers certificate fixing terms and conditions); *CAB v. Delta Air Lines, Inc.,* 367 U.S. 316, 324-25 (1961) (a certificated commercial airline carrier's operations could not be curtailed without notice or hearing because the aviation statute clearly provided for notice and hearing"); *Oceanair of Florida v. DOT,* 876 F.2d 1560 (11th Cir. 1989) (no regulatory authority to revoke air carrier's certificates without hearing on the record).

C. TO NOT REVIEW LOCAL ADMISSION RULES

In denying any relief upon Petitioners' challenges to local admission rules, the Court of Appeals apparently determined failure to exercise discretion in determining whether to waive L.R. 83.3(a) or to decide the Equal Protection Clause challenge pursuant to L.R. 83.3(e) (2) (A) & (B) was either not clear error or not "new and important." L.R. 83.3(e) (2) itself requires determination of the constitutional issue. App. W at 146a ("Unless authorized by the Constitution of the United States or acts of Congress,"). Respondent District Court's reasoning that he had no authority to waive his rules is clear error. He clearly had such authority. *Gerritsen v. Consulado General de Mexico,* 989 F.2d 340, 342, n.1 (9th Cir. 1993).

"Admission to practice law before a state's courts and admission to practice before the federal courts in that state are separate, independent privileges." *Theard v. United States,* 354 U.S. 278, 281 (1957)); *Brown v. Smith,* 222 F.3d 618 (9th Cir. 2000) (*citing Theard*). "[W]hen a state licensing law excludes a lawyer from prac-

tice that federal rules expressly allow, the two rules do conflict, and the state law must give way." *Sperry v. Florida ex rel. Florida Bar,* 373 U.S. 379, 383-385 (1963) (a state has no power of review over federal determination of practice authority). States cannot impose licensing requirements on federal government contracts. *Leslie Miller, Inc., v. Arkansas,* 352 U.S. 187 (1956) (*cited in Sperry, supra,* 373 U.S. at 403). *See Rittenhouse v. Delta Improvement, Inc.)*, 291 F.3d 925 (6th Cir. 2002) (Texas bar member a resident of Wisconsin practicing bankruptcy law not admitted to the Michigan bar eligible to practice in Michigan federal district court notwithstanding a dispute with Michigan state bar. He had "a valid state source of the authority to practice law: he is properly licensed by Texas.").[26]

Petitioners Arment and Research Air complain about their attorney's exclusion when the government's attorney is not subject to the same admission requirements that discriminate in violation of the Equal Protection Clause. Respondent District Court improperly based his denial on Ditton not having passed the Montana Bar Examination.[27] *See Frazier v. Heebe,* 482 U.S. 641, 646 (1987) (local rule requiring members of Louisiana state bar either reside or maintain an office in Louisiana "unnecessary and irrational"). Montana resident attorneys who have not passed any bar examination are admitted to practice automatically if they represent the federal government while Mr. Ditton who has passed a bar examination (Virginia Feb. 1982, during law school, and who was an Army JAG) is absolutely denied admission. As applied to Petitioners as a class of one, Respondent

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[26]Private attorneys practicing federal government contracts law are not required to be members of state bars where they live or have an office. *See, e.g., COFC,* Rule 81(b); ASBCA (1 July 1997), Rule 26; *GAO Rules of Practice*, 4 C.F.R § 21.

[27]Until after 1980, law school graduates of the University of Montana were admitted to the Montana State Bar without passing any multi-state or state bar examination. The justification then given as a rational basis for the "diploma privilege" was state court judges' "familiarity" with the state law school. *See Goetz v. Harrison*, 154 Mont. 274, 280-281, 462 P.2d 891 (1969) (denying Yale law school graduate admission); *Huffman v. Montana Supreme Court,* 372 F. Supp. 1175 (1974) (denying U. of Chicago law school graduate admission). That rationale was discarded in *Matter of Bar Examination*, 187 Mont. 159, 187, 609 P.2d 263 (1980) ("The wrong people are making threshold decisions that have the effect of transferring control of the admission of lawyers to the Bar away from the court of last resort, ..."). Nonetheless, diploma privileged attorneys were grand-fathered into the federal bar.

District Court discriminates irrationally against him. *See Willowbrook v. Olech*, 528 U.S. 562 (2000). Denying Mr. Ditton admission in this case because he has not taken and passed the Montana state bar examination is irrational when federal government contracts, constitutional, and administrative law are not tested by that examination differently than any other state's bar examination. Those subjects, if tested, are done so uniformly on a national basis by the multi-state bar examination that he already has passed.

CONCLUSION

Through enforcement of a new strange little rule proclaiming superiority over nationwide federal rules of appellate procedure endorsed by this Court and Congress, contrary to other federal statutes and all other circuits, the Court of Appeals abdicated from considering matters of substantial, significant national importance that irreparably injures Petitioners. The record shows untoward involvement by clerks/motions attorneys that amount to fraud on the court. The Ninth Circuit's *Bauman* formula as applied for all writs relief imposes conditions violating the Court's precedent and decisions of other circuit courts of appeal. Federal officers acted without any statutory authority and in derogation of the Transportation agencies having exclusive and final authority in matters of aviation safety, regulation and commerce. They violated Petitioner Arment and Research Air's constitutional rights to due process of law. The district court refuses to rule and the circuit court refuses to protect its appellate jurisdiction. This is not justice. Petitioners respectfully request that for the foregoing reasons this petition should be granted forthwith.

Respectfully submitted,

RESEARCH AIR, INC.,
CHARLES R. ARMENT and
MICHAEL H. DITTON.
by: _____
/s/Michael H. Ditton
Counsel of Record
2210 Bridger Drive
Bozeman, Montana 59715
(406) 587-7386

August 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Circuit No. 04-70454

RESEARCH AIR, INC.; ET AL.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA (BUTTE),

Respondent,

HONORABLE GAIL A. NORTON, Secretary of the Interior; et al.,

Real Parties in Interest.

D.C. No. CV-03-00054-RFC

ORDER
[Filed May 17, 2004]

Before: KOZINSKI and PAEZ, Circuit Judges

Petitioners' motion to vacate the Clerk's April 5, 2004, order and file petitioners' petition for rehearing and rehearing *en banc* is denied. Any request for rehearing of an order filed by a motions panel must be filed within 14 days from the date of the motions panel order. *See* 9th Cir. R. 27-10; *see also* Circuit Advisory Committee Note to Rules 21-1 to 21-4.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

APPENDIX B

PETITIONER'S LETTER TO CLERK OF THE COURT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

April 28, 2004

Cathy A. Catterson
Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, California 94119-3939

Re: *In Re Research Air, Inc. (9th Cir. No. 04-70454)*

Dear Ms. Catterson:

I am attorney for Petitioners in a case before the Court. Petitioners invoked the Court's jurisdiction by submitting a Petition for Writs of Mandamus and/or Prohibition to the Court in overnight mail on January 29, 2004. Petitioners included payment of the $250.00 original proceedings filing fee. Along with their Petition, Petitioners submitted a Motion For Expedited Consideration pursuant to Circuit Rules 27-12, 27-3, and 34-3(5), stating as grounds, *inter alia*, the District Court's refusal to rule on the preliminary injunction motion and giving priority to a local counsels' motion to withdraw, scheduling a hearing on that motion for January 30, 2004.

Petitioners and I complain about several acts occurring in your office by deputy clerks relating to the above-styled proceedings. These acts involve fabricating a nonexistent case, demanding an additional $255.00 from Petitioners as a "filing and docketing fees," dismissing the entire Petition within two hours of my telephone calls inquiring and complaining about the nonexistent case and demand for another docketing fee, and then wrongly dismissing our Petition for Rehearing and Suggestion for Rehearing *En Banc* as untimely without any lawful authority.

Petitioners spent considerable time, effort and money sending their Petition for Writs of Mandamus and Prohibition with accompanying Record Excerpts of Administrative and Court Proceedings to the Court in overnight mail on January 29, 2004 so that the Petition would arrive during the morning of January 30, 2004. There was a hearing scheduled for 2:00 p.m. MST that day in the district court. My check in the amount of $250.00 for the filing fee was enclosed and my cover letter clearly identified the Petition as an original proceeding. The shipping receipt and package tracking report shows delivery by UPS to the Court on January 30, 2004 at 8:48 a.m. PST. (Encl. 1). The Petition, however was not filed until February 2, 2004, according to a docketing statement dated February 2, 2004 bearing deputy clerk Verna Travis's name. The Court's docket number is stated as 04-70454. The following day I received a receipt from the Court signed by deputy clerk Richard Rhodes showing the Court received and deposited Petitioner's payment of the $250.00 original proceedings docketing fee on January 30, 2004.[1] (Encl. 2). In other words, your office took and banked our money on January 30th, refused to file our papers, and wasted our money spent on overnight delivery. Petitioners would not have spent the time, effort and money to overnight mail the Petition to the Court if they had known the Court would not file the Petition until three days later. As you know your clerks are responsible for docketing the case "immediately" upon receipt.

On February 13, 2004 I received in U.S. mail a docketing statement from the Court bearing deputy clerk Teresa Mitchell-Bell's name. This statement is dated February 6 and postmarked February 10, 2004. I thought this was a correction to the case caption ("USDC-MOB" for "USDC-MBU") and did not notice the different docket number. Although this statement refers to the Petition for Writs of Mandamus and/or Prohibition, it lists a different docket number: 04-70572. Petitioners, however, only submitted one petition to the Court.

On February 23, 2004 I received in U.S. mail from the Court an order purporting to dismiss 04-70572 unless within 14 days Petitioners paid a $255.00 filing fee. The order is dated as filed February

[1]This receipt shows allocation of Petitioners' filing fee to two Ninth Circuit financial accounts. I do not know whether that was proper or not.

17, 2004 and is postmarked that same day. Although the order refers to "this petition for mandamus", the stated $255.00 "filing and docketing fees" is only for appeals. Ila Deiss, motions attorney/deputy clerk, signed this order. I called Ms. Deiss on February 24, 2004 and informed her there was no appeal, there was only one original proceeding for mandamus and prohibition, and Petitioners had paid the $250.00 original proceedings docketing fee. I had spoken on February 23, 2004 with Jane __, a deputy clerk in original proceedings, and with her permission faxed her a copy of the Court filing fee receipt. I also asked her why two different docket numbers appear for one petition. (Encl. 3). I received no response to this letter.[2] According to information I reviewed from the Administrative Office of the United States Courts, the Ninth Circuit is the busiest federal circuit court in the nation. (The Montana district court, on the other hand, is one of the least busiest federal district courts). I am surprised that the Court would countenance fabricating a case to increase the number of cases pending before it, particularly since this information is conveyed to Congress. Further, when I first called the clerk's office on February 23, 2004, I spoke with deputy clerk (Roberta Bradley?) and was told the assigned clerk was sick that day. That makes three different deputy clerks and three other motions attorney/deputy clerks assigned to one original proceeding.

Ms. Deiss gave me Leslie Hale's name as the motions attorney assigned to 04-70454 and Ms. Hale returned my telephone call to her on February 25, 2004. She stated to me that the Court would not consider the motion for expedited consideration (that cites 28 U.S.C. § 1657) until March 15, 2004. Inasmuch as the District Court had issued an order dated February 2, 2004 stating Petitioners below had to notify the court within 20 days whether they intended to proceed pro se, I told her Petitioners wanted the Court to order the District Court to take no further action in the case pending disposition of the Petition other than to rule on the preliminary injunction motion. She

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[2]The Court's docket sheet strangely refers to my residence state as "MO" presumably meaning Missouri, instead of Montana, and there is no obvious reason how such an error was made. For your information, in 2000, a Virginia state employee official sent to the state of Montana an affidavit falsely stating my birthplace as "Terry, MO" instead of Terry, MT. Further, although AUSA Darragh is listed as making an appearance, Petitioners have never been notified of that.

emphasized that we had filed the Petition on February 2, 2004, when in fact clerks, not Petitioners, delayed filing the Petition until then. (The District Court's order is dated February 2, 2004 and occurred after Petitioners sent the Court, and delivered to Respondent District Court, their Petition. On February 5, 2004 Petitioners sent the Court a copy of this order as an addendum to their Petition.). Ms. Hale then said another motions attorney would handle this matter and call me back in five minutes.[3] No one called me. Two hours later Cecilia Dennis, motions attorney/deputy clerk, faxed to me a three sentence order from the Court stating the Court had dismissed the entire Petition and then denied "all motions" as moot. She apparently drafted the dismissal order herself. (*See* filename on February 25, 2004 Order at 1). No one told me that if I asked for expedited consideration by the Court the entire Petition could or would be summarily dismissed. I only anticipated that the Court would rule upon

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[3]She also asked me whether irreparable injury was discussed in the Petition and I replied yes. *See* Petition at 4 and nn. 5 & 6 and accompanying cited record excerpts including two Plaintiff affidavits. The motion itself states in pertinent part:

Without the Interior pilot card wrongly withheld from Petitioners, without reinstatement of their basic ordering agreement and listing of Petitioners' names on Interior's approved vendor pilot and aircraft lists, and without enjoining the continued maintenance and dissemination of false, derogatory and stigmatizing information about Petitioners, Petitioners suffer irreparable injury. Petitioners are not Delta Air Lines, however, their expectations and rights are the same and their investments proportionally similar. Petitioners lost about $38,640 in income from federal government contracting because of Respondents' initial March 27, 2002 suspension and contract exclusions. Because of Respondents' *ultra vires*, unconstitutional, and otherwise illegal actions Petitioner Arment's annual salary has been only $400.00. Petitioners had invested about $300,000 in their FAA Part 135 commercial flight operations small business. Since May 6, 2003 when Respondent Smith illegally imposed sanctions against Petitioners, Petitioners have had only less than $1,200 in income compared with annual expenses of about $13,000. On November 24, 2003 Petitioners' local counsel filed a motion to withdraw from representing Petitioners in the district court action. Respondent District Court on January 7, 2004 scheduled a hearing on that motion for January 30, 2004 at 2:00 p.m. In doing so he gave priority over deciding Petitioners' motion for preliminary injunction filed July 2, 2003 and his failure to decide that motion deprived Petitioners of relief to recover financially or their appeal rights under 28 U.S.C. 1291.

Respondents' *ultra vires* actions publicly stigmatize Petitioners. Respondents have branded Petitioners unsafe in their chosen profession of civil commercial aviation although Petitioner Arment since 1992 has never received any unsatisfactory marks on his annual FAA pilot and part 135 flight evaluation checks, nor any

Petitioners' motion for expedited consideration. If the Court denied that motion the Court would nonetheless in due course consider the merits of the Petition. Nothing I stated to Ms. Hale derogated from the reasons given in the Petition for extraordinary relief that includes *ultra vires* action by a federal agency and officers impairing the concurrent prospective jurisdiction of the appeals court and denial of admission of myself as Petitioners' attorney pursuant to the district court's unconstitutional local rules, in addition to the district court's refusal to rule upon the preliminary injunction motion having a statutory duty to do so. She never mentioned *Bauman* and, in any event, *Bauman* is discussed in the Petition insofar as the guidelines therein are applicable.

No one has responded to my verbal and written complaints about the Court docketing two separate cases and demanding further money from Petitioners as "docketing and tiling fees". There is no notice of appeal in the district court civil action so there could not be any case in which to assess an appeal docketing fee. Petitioners

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on Respondents flight evaluation checks.[2] Petitioners' names were removed from Interior's exclusive vendor pilot and aircraft lists. *OAS Aircraft Source List* (available at http ://www. oas.gov/source/AirMulti. asp). Respondents placed Petitioners' names in an OAS SAFECOM Internet website readily accessible and searchable by the public that can retrieve false and derogatory information about Petitioners, *inter alia.* an OAS April 2000 SAFECOM alleging violation of 14 C.F.R. §§ 91.119(b) & (c), unnoticed to Petitioner Arment that he strenuously denies. R. 51 & R. 16 at 1 5. Within Interior's records are OAS McCorkle's February 19, 2003 memorandum to Respondent Smith falsely charging Petitioner Arment committed an aircraft maintenance safety violation (R.52) and OAS Director McCuny's April 4, 2002 memorandum to FWS ASM Butler concluding that "Arment failed to maintain a minimum of 500 feet from structures (powerlines) which constitutes a violation of FAR 91.119"; and, "by under flying the powerlines and subsequently contacting the frozen surface of the river, Mr. Arment placed himself and Mr. Kitcheyan in serious jeopardy" (R.31). These are false and derogatory Interior records. See R. 16 at ¶ 3-4, 6. Respondents also maintain false and derogatory information about Petitioners publicly accessible through the Internet at Respondents' searchable website in a SAFECOM referring to an April 2000 alleged federal aviation regulation violation while flying near Yellowstone National Park. Records system managers Smith and Galloway unilateral disclose, "to Federal, State, or local agencies or commercial businesses where necessary to obtain information relevant to the hiring or retention of an employee, or the issuance of a security clearance, license, pilot qualification card, grant or other benefit." 64 *Federal Register* 66, 16981-16983 (Apr. 7, 1999).

Motion For Expedited Consideration at 7-9. (footnotes omitted).

timely filed their mandamus and prohibition writs petition to seek relief from the Ninth Circuit to order the district court to rule on plaintiffs' preliminary injunction motion pending since July 2, 2003 in the District Court. Petitioners learned in January 2004 that the District Court prioritized local counsels' motion to withdraw over deciding the preliminary injunction motion that violates 28 U.S.C. § 1657. Petitioners alleged serious economic and constitutional injuries from Department of Interior's denial of their right to practice their profession and earn a living having no authority to restrict Petitioners' commercial flight operations and providing Petitioners no due process of law when blacklisting them. Petitioners' complaint is unanswered with only defendants' response to preliminary injunction motion and their motion to dismiss interposed as reasons for denying relief, upon which the district court refuses to rule. As the Petition explains, it was nonsensical for the district court to prioritize local counsels' motion to withdraw for failure to pay them attorney fees when Petitioners had no income to keep paying them because of the illegal acts they had complained about in the civil action since July 2, 2003 and Petitioners' preliminary injunction motion to remove those illegal impediments remained pending.

Your deputy clerk dismissed the Petition only after my complaints to the Court about a nonexistent appeal or case—a second case separately docketed from the one Petitioners submitted—and another deputy clerk/motions attorney demanded an additional $255.00 that I refused. This appears retaliatory. I seriously doubt the motions panel actually read the Petition and accompanying appendix with addenda (totaling about 300 pages) given the brief time between my conversation with Ms. Hale and the order faxed to me by Ms. Dennis.

Then after petitioning the Court for rehearing and rehearing *en banc*, submitted to the Court on March 17, 2004, Ms. Dennis herself on April 5, 2004 summarily denied the petition (that is not a motion) stating it was untimely as not being filed within 14 days of the February 25, 2004 dismissal order. A certified deputy clerk or motions attorney has no authority to deny a petition for rehearing. *See* Ninth Circuit General Orders and Appendix A. FRAP Rules 40 and 35 plainly state we had 45 days to petition for rehearing. *Al-Harbi v. INS*, 284 F.3d 1080, 1082 (9th Cir. 2002) ("In our decision filed on March 9, 2001,

Al-Harbi prevailed on his Petition for Review. The government had until April 23, 2001 to file a petition for panel rehearing or for rehearing *en banc*, ...") (footnote omitted). *See* 28 U.S.C. § 46(c); *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247 (1953). Your published civil and agency processing guidelines clearly state such a petition is due "[w]ithin 14 days after decision is filed or 45 days, if USA is a party in a civil case.". The petition was timely because your office received the petition within 45 days, this is a civil case, and the United States, a federal agency, and federal officers are obviously named parties in these proceedings. As a result of this second dismissal Petitioners had to spend additional aggravating time, effort, and expense to preserve their rights and correct your clerks by submitting a motion to vacate illegal order. Dismissal of Petitioners' rehearing petitions appears to cover-up and obstruct presentment of Petitioners' arguments and statements from the original panel judges and the entire Court.

I request you investigate the facts and circumstances of these matters, explain why and how the acts we complain about happened, and discipline those responsible including referral of any criminal matters to the appropriate law enforcement agency. *See e.g.*, 18 U.S.C. §§ 1001; 1341; 1343; 1951; 1952; & 371. Petitioners abide by the rules, including Circuit Rules, and make their submissions in good faith. Deputy clerks in these proceedings ignore or violate the rules in serious matters of nationwide importance depriving Petitioners of their rights to be heard by judges of this Court. The merits of the matters Petitioners brought to the Court's attention in their Petition are not contested. While deputy clerks in your office apparently play perverse shell games with the Petition and Petitioners' papers. Petitioners continue to suffer with no relief in sight.

If you have any questions, please call me.

Sincerely,

/s/ Michael H. Ditton
Individually as an officer of the court;
Individually as Petitioner on Petition Part III
As Attorney for Petitioners Charles R. Arment
and Research Air, Inc.

Encls.:

1. UPS Shipping Tracking Report, Invoice, and Petitioners' January 29, 2004 transmittal letter;
2. Ninth Circuit Receipt for payment of docketing fee dated January 30, 2004;
3. Petitioners' February 23, 2004 facsimile letter with court receipt to Clerk of Court's office.

CF:
Charles R. Arment and Research Air, Inc.

APPENDIX B—ENCLOSURE 1

UPS United States UPS Global Site

Home | About UPS | Contact UPS | Welcome Center

Tracking Log-In User ID: Password: Forgot Password

- Track by Tracking Number
- Track by Reference Number
- Import Tracking Numbers
- Track by E-mail
- Get Quantum View Files
- Request Quantum View Notify
- Void a Shipment
- Help

Learn about UPS Drop Boxes

Track by Tracking Number

Track by Tracking Number

View Details

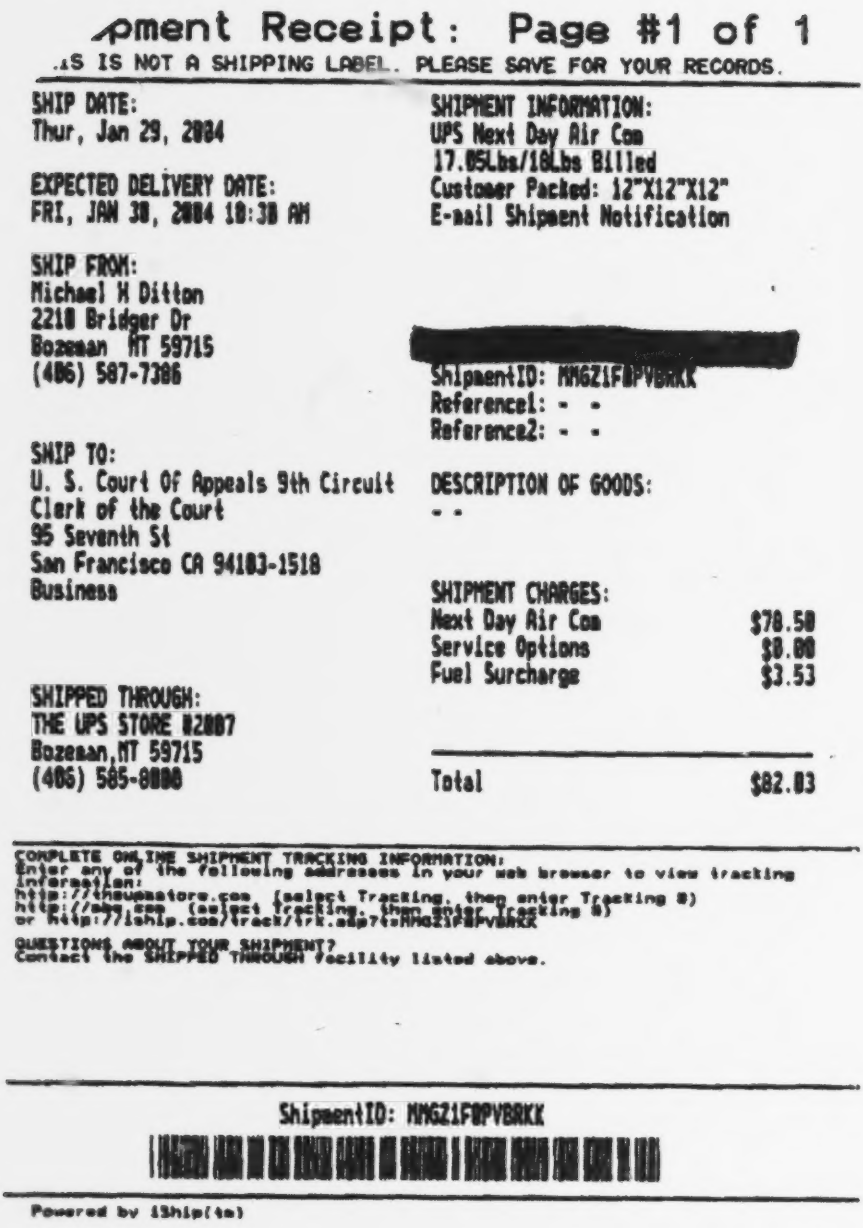
View Details

Status:	Delivered
Delivered on:	Jan 30, 2004 8:48 A.M.
Signed by:	YU
Location:	RECEIVER
Delivered to:	SAN FRANCISCO, CA, US
Shipped or Billed on:	Jan 29, 2004
Tracking Number:	1Z 597 703 01 6490 686 7
Service Type:	NEXT DAY AIR
Weight:	17.10 Lbs

Package Progress:

Date	Time	Location	Activity
Jan 30, 2004	8:48 A.M.	SAN FRANCISCO, CA, US	DELIVERY
	8:31 A.M.	SAN FRANCISCO, CA, US	OUT FOR DELIVERY
	6:45 A.M.	SAN FRANCISCO, CA, US	ARRIVAL SCAN
	5:27 A.M.	OAKLAND, CA, US	DEPARTURE SCAN
	3:07 A.M.	OAKLAND, CA, US	ARRIVAL SCAN
	2:05 A.M.	ONTARIO, CA, US	DEPARTURE SCAN
Jan 29, 2004	11:01 P.M.	ONTARIO, CA, US	ARRIVAL SCAN
	9:54 P.M.	COMMERCE CITY, CO, US	DEPARTURE SCAN
	8:41 P.M.	COMMERCE CITY, CO, US	ARRIVAL SCAN
	7:35 P.M.	BILLINGS, MT, US	DEPARTURE SCAN
	7:29 P.M.	US	BILLING INFORMAT RECEIVED
	6:52 P.M.	BILLINGS, MT, US	ARRIVAL SCAN
	6:10 P.M.	BOZEMAN, MT, US	DEPARTURE SCAN
	6:34 P.M.	BOZEMAN, MT, US	ORIGIN SCAN
	6:06 P.M.	BOZEMAN, MT, US	PICKUP SCAN

APPENDIX B—ENCLOSURE 1



pment Receipt: Page #1 of 1

.IS IS NOT A SHIPPING LABEL. PLEASE SAVE FOR YOUR RECORDS.

SHIP DATE:
Thur, Jan 29, 2004

EXPECTED DELIVERY DATE:
FRI, JAN 30, 2004 10:30 AM

SHIP FROM:
Michael H Ditton
2210 Bridger Dr
Bozeman MT 59715
(406) 587-7386

SHIP TO:
U. S. Court Of Appeals 9th Circuit
Clerk of the Court
95 Seventh St
San Francisco CA 94103-1518
Business

SHIPPED THROUGH:
THE UPS STORE #2007
Bozeman,MT 59715
(406) 585-0000

SHIPMENT INFORMATION:
UPS Next Day Air Con
17.05Lbs/18Lbs Billed
Customer Packed: 12"X12"X12"
E-mail Shipment Notification

[redacted]

ShipmentID: MMGZ1F0PVBRKK
Reference1: - -
Reference2: - -

DESCRIPTION OF GOODS:
- -

SHIPMENT CHARGES:

Next Day Air Con	$78.50
Service Options	$0.00
Fuel Surcharge	$3.53
Total	$82.03

COMPLETE ONLINE SHIPMENT TRACKING INFORMATION:
Enter any of the following addresses in your web browser to view tracking information:
http://theupsstore.com (select Tracking, then enter Tracking #)
http://ups.com (select Tracking, then enter Tracking #)
or http://iship.com/track/trk.asp?toMMGZ1F0PVBRKK

QUESTIONS ABOUT YOUR SHIPMENT?
Contact the SHIPPED THROUGH facility listed above.

ShipmentID: MMGZ1F0PVBRKK

Powered by iShip(tm)

APPENDIX B—ENCLOSURE 1

MICHAEL H. DITTON
ATTORNEY AT LAW
2210 Bridger Drive
Bozeman, Montana 59715
(406) 587-7386 (voice/facsimile)

Admitted to practice in Virginia and the District of Columbia

February 23, 2004

VIA FACSIMILE

Clerk of the Court
ATTN: Original Proceedings/Jane
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1518

Re: No. 04-70572; No. 04-70454; In Re Research Air, Inc. v. USDC

Dear Clerk of the Court:

This is in furtherance of my telephone conversation with Jane today. I received in U.S. mail this afternoon an Order dated February 17, 2004, postmarked February 17, 2004, signed by deputy motions clerk Ila Deiss, Motions Attorney/Deputy Clerk, stating a filing fee of $255.00 was due in No. 70572. I paid the Writ Petition filing fee of $250.00 on January 29, 2004. A receipt showing that amount received and deposited by the Court is attached. I do not know why two different docket numbers appear for one Petition. Why do two different docket numbers appear? What is the status of No. 04-70454?

If you have any questions, please call me.

Sincerely,

Michael H. Ditton
Attorney for Charles R. Arment
and Research Air, Inc.
Petitioners and Petitioner

CF:
Charles R. Arment and Research Air, Inc.

APPENDIX B—ENCLOSURE 2

Customer's Copy

Receipt for Payment
U. S. Court of Appeals for the Ninth Circuit

59211

Friday, January 30, 2004
Research Air & Chas.
Arment v DOI, et a

Account: TREASURY
Amount Paid: $250.00, Check Number 104

Received From:

Michael H. Ditton
2210 Bridger DR
Bozeman, MT 59715

Account		Amount
510000	Writ Of Mandamus	$150.00
86900	Writ Of Mandamus	$100.00

Two Hundred Fifty and 00/100 Dollars
Deputy Clerk: Richard Morales

APPENDIX B—ENCLOSURE 3

FACSIMILE TRANSMISSION

Michael H. Ditton
Attorney at Law
2210 Bridger Drive, Bozeman, Montana 59715
Tel.: (406) 587-7386 (voice/facsimile)

February 23, 2004 CONFIDENTIAL

To	*From*
Clerk of the Court/Attn: Jane	Michael H. Ditton
Court of Appeals Ninth Circuit	Attorney at Law
Fax: (406) 556-9624	Fax: (406) 587-7386
Tel.: (415) 556-9740	Tel.: (406) 587-7386
This fax consists of pages 2 including this cover sheet. Please inform me if transmission errors occur.	

Re: No. 04-70572; No. 04-70464; In Re Research Air, Inc. v. USDC - Petition For Writs of Mandamus and Prohibition and Motion For Expedited Consideration

NOTE: This entire transmission is intended only for the use of the individuals or entity to which it is addressed, and contains information that is privileged, confidential, and exempt from disclosure under applicable law. If the reader of this communication is not the intended recipient or the employee or agent responsible for delivering the attached material to the intended recipient, you are hereby notified that any dissemination, distribution, disclosure, use or copying of this material is strictly prohibited, and constitutes a felony crime under federal law. If you have received this communication in error, please notify me immediately by telephone and return the original message to me at the address above via the U.S. Postal Service. You will be reimbursed for all reasonable expenses.

LAST TRANSACTION REPORT FOR HP FAX-700 SERIES VERSION: 01.00

FAX NAME: M DITTON DATE: 23-FEB-04
FAX NUMBER: 4065877386 TIME: 17:00

DATE	TIME	REMOTE FAX NAME AND NUMBER	DURATION	PG	RESULT	DIAGNOSTIC
23-FEB	16:58 S	14155569624	0:01:44	3	OK	6A3040100190

S=FAX SENT
O=POLLED OUT(FAX SENT)

TO PRINT THIS REPORT AUTOMATICALLY, SELECT AUTOMATIC REPORTS IN THE SETTINGS MENU.
TO PRINT MANUALLY, PRESS THE REPORT/SPACE BUTTON, THEN PRESS ENTER.

APPENDIX C

IN THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT

Circuit No. 04-70454

IN RE RESEARCH AIR, INC, AND CHARLES R. ARMENT,
Petitioners/Plaintiffs,

v.

HONORABLE GAIL A. NORTON, SECRETARY, Department of Interior,
STEVE R. SMITH, West Area Director, Office of Aircraft Services,
ROBERT A. GALLOWAY, Aviation Safety Manager, Office of Aircraft Services,
DEPARTMENT OF INTERIOR, United States of America,
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA,
Respondents/Defendants.

D.C. No. CV 03-54-BU-RFC
[Filed April 16, 2004]

MOTION TO VACATE ILLEGAL ORDER AND FILE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Petitioners, pursuant to Federal Rules of Appellate Procedure ("FRAP") Rules 27, 35 and 40, through their undersigned attorney, hereby move the Court for entry of an order vacating motions attorney/deputy clerk Cecilia Dennis's April 5, 2004 order (Ex. 1) denying as untimely Petitioners' FRAP 35 & 40 Petition for Rehearing and Suggestion for Rehearing *En Banc* and ordering the Clerk to file those papers *nunc pro tunc* and circulate them to each judge in active service of the Ninth Circuit Court of Appeals. The grounds for this motion are that the April 5, 2004 order illegally denies Petitioners' rehearing rights under 28 U.S.C. § 46 and FRAP

Rules 35 and 40 by dismissing their rehearing petitions as untimely when Petitioners had 45 days within which to petition the court for rehearing and the Court received the rehearing petitions March 22, 2004 (Ex. 2), 26 days after the February 25, 2004 panel order dismissing the mandamus and prohibition writs petition. Further, under the Court's internal procedures the staff attorney had no authority to deny Petitioners' petitions.

By order dated February 25, 2004 a panel of this court denied Petitioners' Petition for Writs of Mandamus and Prohibition.[1] Respondent real parties in interest are the United States, Department of the Interior, Interior Secretary Gale Norton, Office of Aircraft Services West Area Director Steve Smith, Office of Aircraft Services Aviation Safety Manager Robert Galloway and United States District Court for the District of Montana. The caption assigned this original civil proceeding so states. The individual respondents are officers of the United States.

By order dated April 5, 2004 Ninth Circuit motions attorney/deputy clerk Cecilia Dennis denied Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc as untimely citing Ninth Circuit Rule 27-10. (Ex. 1). Circuit Rule 27-10 is styled "MOTIONS FOR RECONSIDERATION" and by its terms applies to motions.[2] Petitioners did not submit or file a "motion for reconsideration, clarification or rehearing of an order or cite Circuit Rule 27-10. What Petitioners did submit citing FRAP 35 & 40, received by the Court on March 22, 2004 (Ex. 2), is a "Petition For Rehearing and

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[1]The petition invokes this Court's concurrent and prospective jurisdiction under the Federal Aviation Act and the Independent Safety Board Act and seeks a writ of mandamus ordering in aid of that jurisdiction. The petition also seeks a writ of mandamus ordering Respondent District Court to decide Petitioner's Motion for Preliminary Injunction filed July 2, 2003 and stop violating 28 U.S.C. 1657 by prioritizing other matters over this motion. The Petition also seeks an order admitting Petitioners' attorney Ditton's admission to the District Court upon determining the District Court's local attorney admission rules are unconstitutional.

[2]This rule states:

Unless the time is shortened or enlarged by order of this court, a motion for clarification, reconsideration, or rehearing of an order entered by a motions panel must be filed within 14 days of the date of the order, except a prisoner not represented by an attorney shall have 28 days.

Suggestion For Rehearing *En Banc*." Pursuant to Circuit Rule 35-4 pertaining to petitions for rehearing en banc Petitioners submitted an original and 50 copies of their petition. *See also* Cir. R. 40-1(b) (petition for panel rehearing alone only requires the original and 3 copies).

"The Court of Appeals of course cannot make the record what it is not.". *Missouri v. Jenkins*, 495 U.S. 33, 49 (1990). Petitioners' papers are clearly a petition, not a motion, and a petition for rehearing and suggestion for rehearing *en banc*, not for reconsideration, clarification or rehearing. The staff attorney's act illegally attempts to make Petitioners' papers what they are not, a motion for reconsideration and not a petition for rehearing or petition for or suggestion for rehearing *en banc*.

Petitioners' petition is timely under the Federal Rules. FRAP 35 "*En Banc* Determination" states in pertinent part: "(c) Time for Petition for Hearing or Rehearing *En Banc*. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.". FRAP 40 plainly states:

> (a) *Time to File; Contents; Answer; Action by the Court if Granted.*
>
> (1) Time. Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

Petitioners' Petition for Writs of Mandamus and Prohibition is clearly a civil case. Petitioners had 45 days within which to petition for rehearing and rehearing en banc. *Bianchi v. Perry*, 154 F.3d 1023, 1024 (9th Cir. 1998) ("Because an officer of the United States was a party, the deadline for filing a petition for rehearing was 45 days from April 9, under Federal Rule of Appellate Procedure 40(a)."); *Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 952 (6th Cir. 1999), *cert. den.*, 531 U.S. 818 (2000) ("In fact, because Rule 40(a) now grants all parties to a civil case in which the United States or a federal agency or officer is a party forty-five days

from the entry of judgment to petition for rehearing, ...[d]uring the first forty-five days of that time, of course, a party may file a petition for rehearing and the court of appeals may agree to rehear the case."). *See Al-Harbi v. INS*, 284 F.3d 1080, 1082 (9th Cir. 2002) ("In our decision filed on March 9, 2001, Al-Harbi prevailed on his Petition for Review. The government had until April 23, 2001 to file a petition for panel rehearing or for rehearing en banc, ...") (footnote omitted). Since Petitioners' rehearing papers were received March 22, 2004 they were timely and should have been filed and distributed to the judges in accordance with the Court's rules.[3]

A staff attorney cannot change the Federal Rules of Appellate Procedure. As the advisory committee notes to the amendment to FRAP 40(a) states:

> Although the first sentence of Rule 40 permits a court of appeals to shorten or lengthen the usual 14 day filing period by order or by local rule, the sentence governing appeals in civil cases involving the United States purposely limits a court's power to alter the 45 day period to orders in specific cases. If a court of appeals could adopt a local rule shortening the time for filing a petition for rehearing in all cases involving the United States, the purpose of the amendment would be defeated.

These notes are "entitled to great weight". *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 261 (1953) (applying 28 U.S.C. § 46). Moreover, Petitioners have a "the right to know the administrative machinery that will be followed" in processing rehearing and en banc petitions. *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 5 (1963). When an appellate court makes rules in this area "it should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it." *Western Pacific*, 345 U.S. at 254-55 (Court

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[3]Circuit Advisory Committee Notes to Rules 35-1 to 35-3(2) state in pertinent part:

> *Petition for Rehearing for En Banc.* When the clerk receives a timely petition for rehearing *en banc*, copies are sent to all active judges. If the panel grants a rehearing it so advises the other members of the Court, and the petition for rehearing *en banc* is deemed rejected without prejudice to its renewal after the panel completes action on the rehearing.

of Appeals could not restrict the initiation of the *en banc* procedure to the court itself, and that a decision striking out an application by a party for *en banc* consideration was error).

Nor can any credible argument be made that extraordinary writ petitions are somehow different from appeals for rehearing purposes. The Ninth Circuit itself has always regarded denial of mandamus and prohibition petitions as subject to petitions for rehearing en banc. *See, e.g., Ellis v. United States Dist. Court (In re Ellis)*, 294 F.3d 1094, 1099-1100 (9th Cir. 2002), *withdrawn*, 313 F.3d 1094 (9th Cir. 2002), *rev'd on rehearing en banc*, ___ F.3d __ (9th Cir. Feb. 4, 2004) (United States real party in interest); *Miller v. Gammie*, 335 F.3d 889, 895 (9th Cir. 2003) (*en banc*) (Nevada state respondent); *In Re McClatchy Newspapers , Inc. v. United States Dist. Court (In Re McClatchy Newspapers)*, 288 F.3d 369 (9th Cir. 2002) (United States a named real party in interest); *Rosenfeld v. United States*, 859 F.2d 717 (9th Cir. 1988) (denying government's mandamus petition in opinion as amended on denial of rehearing and rehearing *en banc*). There is no authority whatsoever for eliminating original proceedings or extraordinary writs from petitions for rehearing en banc. 28 U.S.C. 46(c) ("Cases and controversies").

The Court cannot deny Petitioners their right to petition for panel rehearing and suggest rehearing en banc. *William H. Banks Warehouses, Inc. v. Watt*, 205 F.2d 44 (9th Cir.) (*per curiam*) *cert. den.*, 74 S.Ct. 43 (1953) (upon Supreme Court remand vacating panel denial of rehearing en banc without determination by the active judges of the court); *Thomas v. United States*, 328 F.3d 305, 308 (7th Cir. 2003) ("Any order that terminates the appeal, and may be reviewed by the Supreme Court, also should be eligible for review by the full court of appeals....Consequently, a document (whether styled "petition for rehearing" or "motion for reconsideration") that seeks review by the court en banc will be distributed to all active judges.").

Moreover, the staff attorney herself had no authority to deny a petition for rehearing or suggestion for rehearing en banc. *See United States v. James*, 146 F.3d 1183 (9th Cir. 1998) (three judge panel); Ninth Circuit General Orders App. A, ¶ 55 (Jan. 1, 2003) (limiting authority to "orders denying untimely motions for reconsideration of a motions panel order"). Indeed, the Court's own rules

provide otherwise: "Upon the filing by a party of a petition for rehearing en banc, the Clerk shall circulate a copy to each active judge and to those senior judges who have requested copies." G.O. 5.4a ("Duties of Clerk") (Mar. 26, 2003).[4]

WHEREFORE, good cause having been shown and pursuant to FRAP Rules 35 & 40, Petitioners request the Court grant this motion, vacate the panel's April 5, 2004 order denying their Petition Rehearing and Suggestion for Rehearing En Banc, file Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc nunc pro tunc as of March 22, 2004, and circulate a copy thereof to each active judge and to those senior judges who have requested copies.

DATED: April 13, 2004

Respectfully submitted,

CHARLES R. ARMENT and
RESEARCH AIR, INC. by

Michael H. Ditton
Attorney at Law
2210 Bridger Drive
Bozeman, Montana 59715
(406) 587-7386 (voice/fax)

/s/ Michael H. Ditton,
VSB No. 21915
Attorney for Petitioners, and
Petitioner on Part IVC *supra*.

[4]Suspension of the General Orders can come only upon a proper two-thirds vote of the court, which, itself must follow the appropriate procedures. *See* G.O. 11.11. Nor does G.O. 6.11 entitled "Suggestions for Rehearing *En Banc*" that refers to motions before a panel alter this result. As shown above such an internal rule cannot change the Federal Rules rehearing timeliness provision or deny petitioners their right to suggest rehearing en banc to all active judges "upon the filing by a party", G.O. 5.4(a). There is no provision for a staff attorney interfering with this process.

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2004 I served a copy of the foregoing Motion to Vacate Illegal Order and to File Petition for Rehearing and Suggestion for Rehearing En Banc by placing a copy in U.S. mail postage prepaid addressed to the following:

Honorable Richard F. Cebull
United States District Court Judge
United States District Court for the District of Montana
James F. Battin United States Courthouse
316 North 26th Street
Billings, Montana 59101
Respondent District Court

George F. Darragh, Jr.
Assistant United States Attorney
U.S. Attorney's Office
P.O. Box 3447
Great Falls, Montana 59403
Counsel for Respondents/Defendants

/s/ Michael H. Ditton

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Circuit No. 04-70454

IN RE: RESEARCH AIR, INC., ET AL.

RESEARCH AIR, INC.; ET AL.,
Petitioners,

v.

UNITED STATES DISTRICT COURT OR THE DISTRICT OF MONTANA,
Respondent,

GALE NORTON, Secretary of the Interior, et al.,
Real Parties in Interest.

D.C. No. CV-03-00054-RFC
DISTRICT OF MONTANA, BUTTE

ORDER

[Filed February 25, 2004]

Before: FERNANDEZ, W. FLETCHER and TALLMAN,
Circuit Judges

Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist. Court,* 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

All pending motions are denied as moot.

DENIED.

02-25-2004 05:10pm From-9th CIR T-814 P 001/002 F-174

FAX SHEET

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Office of Staff Attorneys
95 Seventh Street
P.O. Box 193939
(415) 556-9890

DATE: FEBRUARY 25, 2004

TO: MICHAEL DITTON / GEORGE DARRAGH

TELEPHONE:

FAX #:

FROM: CECILIA DENNIS

TELEPHONE: 415-556-9890

FAX #: 415-556-8181

PAGE(S): 2, including this cover sheet.

MESSAGE: ORDER - RESEARCH AIR v USDC - MONTANA

If you have any questions concerning the transmittal of this material, please contact the sender.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DOES NOT ACCEPT FILINGS TRANSMITTED DIRECTLY BY TELEPHONE FACSIMILE WITHOUT THE EXPRESS PRIOR APPROVAL OF A COURT EMPLOYEE. FAILURE TO REQUEST AND OBTAIN COURT PERMISSION PRIOR TO TRANSMITTING BY FAX MAY SUBJECT THE SENDER TO SANCTION. PLEASE REFER TO 9th CIR. R. 25-3 FOR FURTHER INFORMATION.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street, P.O. Box 193939
San Francisco, CA 94119-3939

February 2, 2004

CA No. 04-70454 Research Air, Inc., v. USDC-MBU

A petition for writ of mandamus and/or prohibition has been received in the Clerk's Office of the United States Court of Appeal for the Ninth Circuit.

The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number when corresponding to this office relative to your case.

If the U.S. Court of Appeal docket fee has not yet been paid, please make immediate arrangements to do so. If you wish to apply for *in forma pauperis* status, you must file a motion for permission to proceed *in forma pauperis* with this court.

Pursuant to Rule 21(b), FRAP, no answer to a petition for writ of mandamus and/or prohibition may be filed unless ordered by the Court. If such an order is issued, the answer shall be filed by the respondents within the time fixed by the Court.

A copy of the docket sheet case title page is attached. Please take special note of the case caption, as it may differ from that shown on the papers submitted for filing. Pursuant to Circuit Rule 21-2, an application for writ of mandamus and/or prohibition shall not bear the name of the district court judge concerned. Rather, the appropriate district court shall be named as respondent.

Very truly yours,

Cathy A. Catterson
Clerk of Court

By: Verna Travis
Deputy Clerk

INTERNAL USE ONLY: Proceedings include all events.
04-70454 Research Air, Inc., et al v. USDC-MBU

In re: RESEARCH AIR, INC AND

CHARLES R. ARMENT

RESEARCH AIR, INC., AND CHARLES R. ARMENT

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA (BUTTE);

Respondent,

GALE NORTON, HON, AS SECRETARY OF THE INTERIOR; STEVEN R. SMITH, West Area Director Office of Aircraft Services,; ROBERT A. GALLOWAY, Aviation Safety Manager, Office of Aircraft Service; DEPARTMENT OF INTERIOR, AND UNITED STATES OF AMERICA

Real Parties in Interest.

Docket as of February 2, 2004 11:45 am

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street, P. 0. Box 193939
San Francisco, CA 94119-3939

February 6, 2004

CA No. 04-70572 Research Air, Inc. v. USDC-MOB

A petition for writ of mandamus and/or prohibition has been received in the Clerk's Office of the United States Court of Appeals for the Ninth Circuit.

The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number when corresponding to this office relative to your case If the U.S. Court of Appeals docket fee has not yet been paid, please make immediate arrangements to do so. If you wish to apply for in forma pauperis status, you must file a motion for permission to proceed in forma pauperis with this court.

Pursuant to Rule 21(b), FRAP, no answer to a petition for writ of mandamus and/or prohibition may be filed unless ordered by the Court. If such an order is issued, the answer shall be filed by the respondents within the time fixed by the Court.

A copy of the docket sheet case title page is attached. Please take special note of the case caption, as it may differ from that shown on the papers submitted for filing. Pursuant to Circuit Rule 21-2, an application for writ of mandamus and/or prohibition shall not bear the name of the district court judge concerned. Rather, the appropriate district court shall be named as respondent.

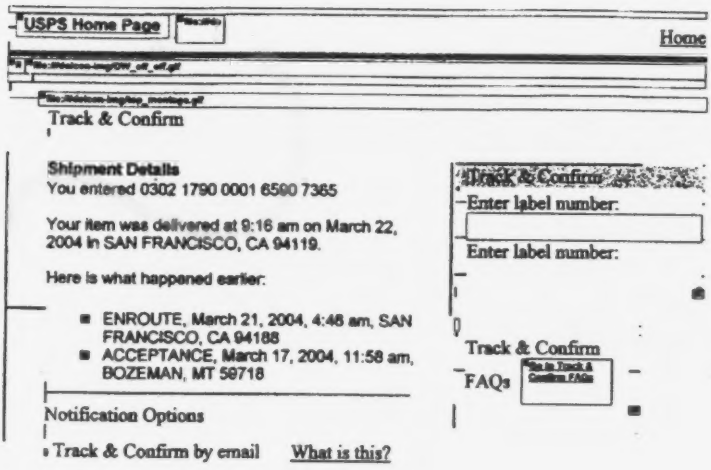
Very truly yours,

Cathy A. Catterson
Clerk of Court

By: Teresa Mitchell-Bell
Deputy Clerk

Titel: USPS - Track & Confirm 4/13/2004

URL: D:\SAVED WORK\ResearchA\Ninth Circuit\Delivery Confirmation Rehearing Petition.htm 12:34:58



MICHAEL H. DITTON
ATTORNEY AT LAW
2210 Bridger Drive
Bozeman, Montana 59715
(406) 587-7386 (voice/facsimile)

Admitted to practice in Virginia and the District of Columbia

March 17, 2004

VIA PRIORITY MAIL

Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, California 94119-3939

Re: Petition For Writs of Mandamus and Prohibition
Research Air, Inc. and Charles R. Arment, No. 04-70454

Dear Clerk of the Court:

Enclosed for filing please find the original and fifty copies of Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc of the motion panel's denial of the Petition for Writs of Mandamus and Prohibition in the above-styled case. If you have any questions, please call me.

Sincerely,

Michael H. Ditton
Attorney for Charles R. Arment
and Research Air, Inc.
Petitioners

Encls.

CF:
Charles R. Arment and Research Air, Inc.
Honorable Richard F. Cebull, United States District Judge
Assistant United States Attorney George F. Darrash

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Circuit No. 04-70454

RESEARCH AIR, INC.; ET AL.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA,

Respondent,

GALE NORTON, Secretary of the Interior, et al.,
Real Parties in Interest.

D.C. No. CV-03-00054-RFC

ORDER

[Filed April 5, 2004]

The petition for rehearing and suggestion for rehearing en banc is denied as untimely. *See* 9th Cir. R. 27-10.

For the Court

/s/ Cecilia Dennis
Motions Attorney/Deputy Clerk
9th Cir. R. 27-7
General Orders/Appendix A

APPENDIX E

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

Circuit No. 04-70454

IN RE RESEARCH AIR, INC., AND CHARLES R. ARMENT,
Petitioners/Plaintiffs,

v.

HONORABLE GALE A. NORTON, Secretary, Department of the Interior,
STEVE R. SMITH, West Area Director, Office of Aircraft Services,
ROBERT A. GALLOWAY, Aviation Safety Manager, Office of Aircraft Services,
DEPARTMENT OF THE INTERIOR, UNITED STATES OF AMERICA
AND
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA,
Respondents/Defendants.

D.C. No. CV 03-54-BU-RFC
[Filed March 22, 2004]

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Petitioners, pursuant to FRAP Rules 35 and 40, hereby petition the Court for rehearing and rehearing *en banc* of the summary denial order dated February 25, 2004 denying their Petition for Writs of Mandamus and Prohibition.[1] The panel's denial conflicts with decisions of the United States Supreme Court, the Ninth Circuit, and other courts of appeal, and involves a question of exceptional

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[1]There is no answer or appearance by respondents in these proceedings.

importance. The panel's denial occurred after a Ninth Circuit deputy court clerk docketed a non-existent Petitioners' appeal whose presence would justify denial of mandamus relief. Petitioners, however, filed no notice of appeal, and submitted only one petition filed as an original proceeding that court staff impermissibly and wrongly bifurcated into a parallel appeal. *See* R.62 (Appeal No. 04-70572) (attached hereto). Fraudulent manipulation of the Court's internal processes denied incontestable constitutional and statutory rights to Petitioners.

Upon Petitioners' Motion for Expedited Consideration the motions panel denied their Petition for Writs of Mandamus and Prohibition, and then denied the motion as moot. The two-sentence denial order states only that Petitioners had not "demonstrated that this case warrants the intervention of this court by means of the extraordinary writ of mandamus. *See Bauman v. United States Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977)." R.63 at 1. This statement overlooks what Petitioners argued and sought, and misapprehends the law. Petitioners stated three grounds for mandamus or prohibition relief: (1) *ultra vires* and unconstitutional federal agency and officer acts involving exclusive administrative and judicial provisions of the federal aviation statutes within this Court's prospective concurrent jurisdiction; (2) Respondent District Court's failure to prioritize and decide Petitioners' Motion for Preliminary Injunction; and, (3) unconstitutional local attorney admission rules denying Petitioners' choice of attorney. Construing *Bauman* to deny Petitioners equitable relief upon uncontested blatant statutory violations conflicts with *Stark v. Wickard*, 321 U.S. 288, 310-11 (1944) ("The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction."); *Leedom v. Kyne*, 358 U.S. 184, 190 (1958) (court will not infer that Congress did not intend courts to protect parties against agency action taken in excess of delegated powers); *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958) (*per curiam*) ("Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers."); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) ("We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it

expects the courts to grant relief when an executive agency violates such a command.").

Applying a *Bauman* demonstration requirement in face of clear violations of the Federal Aviation Act, 49 U.S.C. §§ 40101 *et seq.*, Independent Transportation Board Act, 49 U.S.C. §§ 1901 *et seq.*, and APA, 5 U.S.C. § 701 *et seq.*, depriving this Court of its concurrent and prospective jurisdiction under 49 U.S.C. § 46110 and 49 U.S.C. §1153, is an unreasoned and unprincipled exercise of an appellate court's power conflicting with *In Re California Power Exchange Corp.*, 245 F.3d 1110, 1120 (9th Cir. 2001) ("We generally employ a three-part test to determine whether to grant mandamus relief: '(1) the plaintiff's claim is clear and certain; (2) the duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available.'"); *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 832 (9th Cir. 2002) (same; NEPA violation by BLM). The Court's order is a manifest injustice that perverts the Court's rules and directly conflicts with federal statutes and Supreme Court decisions. 28 U.S.C. § 1651; *Mallard v. United States District Court*, 490 U.S. 296, 309-10 (1989) (reversing court of appeals for denying mandamus to petitioner who met "this demanding standard" and had "an absolute right"); *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978) (absolute right to present its claims to federal forums); *Whitney Nat'l. Bank v. New Orleans Bank*, 379 U.S. 411 (1965); *Roche v. Evaporated Milk Assoc.*, 319 U.S. 21, 25 (1943) ("Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal.").[2] The panel must have misapprehended the Petition. Petitioners have no adequate remedy—conclusively disposing of the first and second Bauman guidelines—because Congress placed administrative decision-making and due process of law in the FAA

[2]*Rees v. United States District Court*, 572 F.2d 700, 702 & *n.*8 (9th Cir. 1978) (noting that the only *Bauman* guideline the Supreme Court identifies as a condition for mandamus relief is that an ordinary appeal after final disposition of these cases for mandamus relief is that an ordinary appeal after final disposition of these cases in the district court is unavailable or inadequate, *citing Kerr v. United States District Court*, 426 U.S. 394, 403 (1976)). *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (mandamus standard is 'clear and indisputable' right to issuance).

and NTSB and judicial review in this Court; that is the whole point of the first ground for extraordinary relief.[3]

The federal agency Respondents refuse to defer to FAA and NTSB, claiming superior authority. Pet. 7-8. Indisputably, however, Department of Transportation and the FAA Administrator have exclusive regulatory authority over aviation safety and commerce. Petitioners "demonstrated" Respondents clearly and indisputably violated these federal statutes necessitating relief from this Court to effectuate Congressional purpose. The Federal Aviation Act gives exclusive administrative agency authority over aviation safety and commerce in the nation's airspace to the FAA. 49 U.S.C. § 40101(a) & (c); *United States v. Varig Airlines*, 467 U.S. 797, 804 & n.5 (1984) ("all regulatory authority"); *Westside Property Owners v. Schlesinger*, 597 F.2d 1214 (9th Cir. 1979) ("authority to regulate the use of all airspace over the United States by both civil and military aircraft"); *Arapahoe County Public Airport Authority v. FAA*, 242 F.3d 1213 (10th Cir. 2001) (City airport authority's proclaimed "safety" and "civil aviation needs" a factual matter for the FAA); *Oceanair v. Transportation*, 876 F.2d 1560 (11th Cir. 1989) (hear-

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[3]*Bauman* itself involved a district court, not a federal agency or officers. The only *Bauman* guidelines that might apply to agency and officer writs are the first and second: whether Petitioners have other adequate means to obtain the requested relief such as a direct appeal and whether Petitioners are damaged or prejudiced in a way not correctable on appeal. 557 F.2d at 654. Petitioners showed irreparable injury through economic losses and illegal deprivation of constitutional rights. Pet.at 18. *Mendenhall v. NTSB*, 92 F.3d 871, 876 (9th Cir. 1996) ("Contrary to the FAA's assertions, ten days without a license is not 'a reasonable period of time,' when one's livelihood depends on it."); *Coteau Properties Co. v. Interior*, 53 F.3d 1466 (8th Cir. 1995) (reversing denial of preliminary injunction for contractor with Interior mining permits because delay, denial or suspension "would clearly cause Coteau serious difficulties in meeting its contractual obligations, if not make it impossible to meet them."); *Collord v. Interior,* 154 F.3d 933 (9th Cir. 1998) (Constitution requires a hearing before Interior can cancel mining claims); *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998) (if prejudice was required plaintiffs showing in connection with due process violation sufficed); *Matter of Sandahl*, 980 F.2d 1118 (7th Cr. 1992) (lack of an adequate remedy by way of direct appeal or otherwise amounts to irreparable harm); *Casad v. HHS*, 301 F.3d 1247, 1254 (10th Cir. 2002) (rejecting appeal for § 1657(a) violation; "The district court has resolved the case; this court can provide no relief for any alleged delay."); *In Re Ellis*, No. 01-70724, 1498 (9th Cir. Feb. 4, 2004) (*en banc*) (uncorrectable prejudice from denial of mandamus relief).

ing on the record required by Congress in Federal Aviation Act applies to revoking air carrier's certificates of public convenience and necessity).[4] Judicial review is lodged in the courts of appeal. 49 U.S.C. §§ 46110 & 1153. *Alameda v. FAA*, 285 F.3d 1143, 1145 (9th Cir. 2002) (§ 46110(a) encompasses orders relating to air safety within court of appeals jurisdiction); *Los Angeles v. FAA*, 239 F.3d 1033, 1036 (9th Cir. 2001) ("Every court of appeals case that could be found exercising jurisdiction under § 46110(a) involved airline commerce and safety or a specific provision under Part A."); *Foster v. Skinner*, 70 F.3d 1084, 1087 (9th Cir. 1995) (claims regarding flight privileges revocation for safety regulation violations court of appeals jurisdiction).

Rehearing *en banc* is necessary because the panel's decision directly conflicts with existing opinions by other courts including the Ninth Circuit and substantially affects a rule of national application in which there is an overriding need for national uniformity -- regulation of the nation's airspace. Deciding that Interior, instead of FAA, had statutory authority to do the acts complained of, or had superior or concurrent authority, when plain statutory language states otherwise manifestly conflicts with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001); *ICC v. American Trucking Associations, Inc.*, 467 U.S. 354 367 (1984) ("[t]o lie within the Commission's discretionary power, the proposed remedy must satisfy two criteria: first the power must further a specific statutory mandate of the Commission, and second, the exercise of power must be directly and closely tied to that mandate."); *Gorbach v. Reno*, 219 F.3d 1087, 1102 (9th Cir. 2000) (*en banc*) (administrative power "must be exercised within the authority granted by the governing statute"); *Burlington Eisinger v.*

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[4]When Congress expressly delegates authority to Interior involving aviation, Congress provides FAA has the final decision. *See U.S. Air Tour Association v. FAA*, 298 F.3d 997 (D.C. Cir. 2002); *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998) (Overflights Act "clearly divides the institutional responsibilities between" the FAA and the Park Service, the Act directs FAA to 'implement the recommendations of the Secretary without change' unless they would adversely affect aviation safety,").

FLRA, 218 F.3d 1097, 1103 & n.5 (9th Cir. 2000) ("Given this clear statutory language, it is unnecessary to abdicate our jurisdiction because Eisinger may have other avenues of relief."). *See Escondido Mutual Water Co. v. La Jolla Bands of Mission Indians*, 466 U.S. 765, 780-81 (1984) (upholding FERC's rejection of Interior's prescriptions that on their face exceed statutorily defined geographic limits on Interior's jurisdiction); *Bonnichsen v. United States*, No. 02-35994 (9th Cir. Feb. 4, 2004) (Interior's regulation conflicting with statute's plain language invalid, *citing Whitman*, 531 U.S. at 481); *Wilderness Society v. Fish & Wildlife Service*, 353 F.3d 1051 (9th Cir. 2003) (*en banc*) (FWS permit for commercial fish enhancement program violated Wilderness Act); American Rivers v. FERC, 201 F.3d 1186 (9th Cir. 2000) ("adopting the sound reasoning in *United States Department of Interior [v. FERC*, 952 F.2d 538, 545 (D.C. Cir. 1992)] which withholds from the agencies a "veto power" over the section 10(j) process"); *United States v. Pend Oreille Pub. Utility Dist. No. 1*, 28 F.3d 1544, 1549 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1356 (1995) ("... but Congress neither required the [Interior] Secretary to include Article 33 in the license nor placed the damage issue "within the special competence of an administrative body" under "a regulatory scheme." *quoting United States v. Western Pac. R.R.*, 352 U.S. 59, 64 (1956)).

Consideration by the full court is also necessary to secure and maintain uniformity of the court's decisions with the Supreme Court and other circuit courts of appeals. *In Re United States*, 345 F.3d 450, 253 (7th Cir. 2003) (Posner, J.) ("The historic and still the central function of mandamus is to confine officials within the boundaries of their authorized powers,"); *Sandahl*, 980 F.2d 1118 ("If the [disqualification] order is plainly wrong—if this is apparent without elaborate consideration of contested facts and legal principles—considerations of administrative efficiency argue for resort to mandamus as a swift and economical remedy against injustice."); *Maloney v. Plunkett*, 854 F.2d 152, 155 (7th Cir. 1988) (writ's "proper use cannot be wholly reduced to formula"); *In re Vargas*, 723 F.2d 1461, 1467 (10th Cir. 1983), *cert. denied*, 469 U.S. 819 (1984) (The right to a writ is "clear and indisputable" when the petitioner can show "a judicial usurpation of power or a clear abuse of discretion", *citing Mallard*); *ALPA v. CAB*, 750 F.2d 81, 84 (D.C. Cir. 1984) (necessary to protect circuit court's exclusive prospective jurisdiction over review of NTSB's predecessor); *Rhode Island Dep't. Env. Mgt. v. United States*, 304 F.3d

31 (1st Cir. 2002); *In Re FCC*, 217 F.3d 125 (2nd Cir. 2000) (issuing mandamus relief where FCC's licensing decisions are subject to the exclusive jurisdiction of the federal courts of appeals and outside the bankruptcy court's limited jurisdiction); *Allied Signal v. Allied Signal, Inc.*, 298 F.3d 263, 270 (3rd Cir. 2002) (writ of mandamus remedy in order to vacate the unauthorized district court order sending case to stranger court, *citing Mallard*).

The panel's implicit holding that Petitioners do not have a clear and indisputable right to be free of *ultra vires* lawless agency action conflicts with *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902); *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 237-38 (1968) ("We deal with conduct of a local Board that is basically lawless."), and *CAB v. Delta Air Lines, Inc.*, 367 U.S. 316 (1961). Construing *Bauman* to deny a writ of prohibition against federal officers acting *ultra vires* conflicts with *Philadelphia v. Stimson*, 223 U.S. 605 (1912); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 701-702 (1949); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Greene v. McElroy*, 360 U.S. 474 (1959). Construing *Bauman* to justify granting Petitioners no relief conflicts with *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497-98 (2001) ("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute.") and *TVA v. Hill*, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.", *citing Marbury*). *See Aid Association for Lutherans v. U.S. Postal Service*, 321 F.3d 1166, 1175 (D.C. Cir. 2003) (challenged regulations emanating from *ultra vires* action cannot survive judicial review under *Chevron*); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327-28 (D.C. Cir. 1996) (*ultra vires* Executive Order); *Dart v. United States*, 848 F.2d 217, 224, 227-31 (D.C. Cir. 1988) ("Were such unauthorized actions to go unchecked, chaos would plainly result."). When denying Petitioners any relief the panel applied *Bauman* guidelines mechanistically in derogation of *Chevron* and *Hill*, and in conflict with *Armster v. United States District Court*, 806 F.2d 1347, 1352 (9th Cir. 1986) ("The *Bauman* factors "are not susceptible of mechanical application" and are only "a useful starting point." *quoting In re Cement*, 688 F.2d 1297, 1301 (9th Cir. 1982), *aff'd for lack of a quorum*, 459 U.S. 1191

(1983)); *United States v. Harper*, 729 F.2d 1216, 1222 (9th Cir. 1984) (same); *Special Investments, Inc. v. Aero Air, Inc.*, No. 02-55788, 2683 (9th Cir. Mar. 2, 2004) ("While the guidelines should inform a court's decision whether to grant a mandamus petition, they are not meant to supplant reasoned and independent analysis by appellate courts.").

Denying mandamus and prohibition relief to Petitioners for Respondent District Court's refusal to decide Petitioners' motion for preliminary injunction pending for over eight months[5] conflicts with 28 U.S.C. § 1657(a); *Ex Parte Bradstreet*, 32 U.S. (7 Pet.) 634, 649-50 (1833); *Life and Fire Insurance Co. v. Wilson's Heirs*, 33 U.S. (8 Pet.) 291, 303 (1834) ("Without the action of the judge the plaintiffs can take no step, unless it be the one they have taken, in this case."); *Insurance Co. v. Comstock*, 83 U.S. 258, 270-71 (1872); *McClellan v. Carland*, 217 U.S. 268, 280 (1910) ("But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."); *Ex Parte Simons*, 247 U.S. 231, 239 (1918) (Holmes, J.) ("If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury."); *Ex Parte United States*, 287 U.S.241 (1932) (refusal to perform a plain ministerial duty); *Williams v. Simons*, 355 U.S. 49 (1957) (*per curiam*);[6] *Beacon Theaters v. Westover*, 359 U.S. 500 (1959); *Thermtron Products Inc. v. Hermansdorfer*, 423 U.S. 336, 352 (1976); *Miller*, 530 U.S. at 349-50 (holding constitutional

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[5]When Interior refused to provide Petitioners any information concerning the sanctions imposed against them, failed to provide adequate notice and a hearing, Petitioners were forced to litigate. Petitioners filed suit within 60 days of Respondent Smith's May 3, 2003 sanctions letter purporting to enforce the federal aviation regulations. Upon finally obtaining the agency record, that only supports Petitioners' arguments. Respondent District Court inexplicably refused to rule although defendants had no further response or reply to the injunction motion. Kept in this judicial purgatory, once the district court gave priority to considering local counsels' unauthorized motion to withdraw (the district court's docket entry # 39—that this was Plaintiff Arment's motion—is a false statement) over another injunction hearing or ruling, Petitioners swiftly sought relief from this Court.

[6]Petitioners correct their explanatory parenthetical on page 24 of their Petition stating the Supreme Court granted a rule to show cause "for refusing to decide state's preliminary injunction motion". That parenthetical should read "for refusing to decide defendants' preliminary injunction motion and state's motion to dismiss".

PLRA provision that requires courts to rule "promptly" on motions to terminate prospective relief, with mandamus available to remedy a court's failure to do so). Failing to prioritize, expedite and decide the preliminary injunction motion also conflicts with *4805 Convoy, Inc. v. San Diego*, 183 F.3d 1108, 1115 (9th Cir. 1999) (more than three months delay does not ensure sufficiently prompt judicial review) and *Nevada Airlines Inc. v. Bond*, 622 F.2d 1017, 1019-20 (9th Cir. 1980) (denying prompt judicial review would raise "serious due process concerns" because administrator's emergency orders were virtually unreviewable through administrative channels).[7] Leaving Petitioners unrepresented by an attorney of their choice in the district court conflicts with *Christensen v. United States District Court,* 844 F.2d 694, 697 (9th Cir. 1988) (mandamus appropriate where district court improperly denies civil litigant choice of trial counsel; once trial is over no way to correct such an error on appeal) and *United v. Santos*, 201 F.3d 953, 961 (7th Cir. 2000) (Posner, C.J.) ("Mandamus would fit this case to a T ...").

The panel order also rests on a false premise—a pending docketed appeal. Petitioners filed no notice of appeal. There can be no appeal in this Court without such a notice. FRAP Rules 3 & 4. Petitioners submitted one original proceedings petition delivered to the Court on January 30, 2004 with a Motion for Expedited Consideration citing 28 U.S.C. § 1657.[8] When Ditton belatedly learned the Court docketed a nonexistent appeal he promptly complained to the clerk's office, the staff attorneys' office, and the circuit executive. Ditton inquired and complained about the Court separately docketing an appeal and demanding an additional filing fee of $255.00. After complaining to staff attorneys Deiss and Hale on February 24 and 25, 2004, the panel order drafted by a staff motions attorney[9] denying the Petition was faxed to Ditton

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[7]*See Post v. Gilmore*, 111 F.3d 556 (7th Cir. 1997) (*per curiam*) (summarily reversing district court for scuttling plaintiff's § 1983 claim, citing § 1657).

[8]Delivery confirmation notice dated January 30, 2004 attached hereto as R.64.

[9]R.63. This is apparent from the face of the order that includes the document's word processing filename as "s:\MOATT\panelord\2.04\cd\04-70454.wpd".

and Respondent counsel.[10] Ditton was not told that if he asked for urgent or emergency consideration the entire Petition itself would be decided in less than two hours.

The artifice of a pending appeal with the Court is material and defeats Petitioners' argument for extraordinary relief inasmuch as one of the five *Bauman* guidelines is availability of appeal. Docketing a nonexistent appeal would influence finding against Petitioners on this factor. Docketing a phantom appeal occurred by no fault of Petitioners. The Court's staff and Circuit Executive refuse to state how or why this happened. There is here not even the appearance of justice. *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix*, 725 F.2d 537, 544 (9th Cir. 1984) (*en banc*) ("If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law."). Petitioners are entitled to rehearing on this basis. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944) (appellate courts' own inherent and discretionary power to set aside a judgment whose enforcement would work inequity); *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991) ("a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud."). *See Dixon v. C.I.R.*, No. 00-70858 (9th Cir. 2003); *In Re Levander*, 180 F.3d 1114 (9th Cir. 1999); *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir. 1995).

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[10]Motions attorney Ila Deiss signed the February 17, 2004 order delivered to Petitioners February 23, 2004 stating a filing fee of $255.00 had not been paid. R.65. Petitioners' attorney Ditton called her on February 24, 2004, informed her Petitioners paid the original proceeding filing fee of $250.00 on January 30, 2004, that he had faxed, with permission, to deputy clerk Jane ____ the Court's fee payment receipt signed by deputy clerk Richard Rhodes, that there was no appeal, and asked her what was going on. R.66. She referred Ditton to motions attorney Leslie Hale for docket number 04-70454. At the conclusion of his conversation with Hale on February 25, 2004, Hale stated to him another motions attorney would then handle the matter and call him in five minutes. No such call occurred. Instead, the panel order summarily denying the Petition arrived on his facsimile machine about two hours later. The third motions attorney is apparently Cecilia Dennis. Hale did not respond to Ditton's March 1 & 3, 2004 letters. R.67.

WHEREFORE, having established the requirements for rehearing, Petitioners request the Court grant this petition for rehearing, vacate the panel's February 25, 2004 order denying their Petition, consider the matter en banc, and grant the requested writs of mandamus and prohibition.

DATED: March 17, 2004

Respectfully submitted,

CHARLES R. ARMENT and
RESEARCH AIR, INC. by

Michael H. Ditton
Attorney at Law
2210 Bridger Drive
Bozeman, Montana 59715
(406) 587-7386 (voice/fax)

/s/ Michael H. Ditton, VSB No. 21915
Attorney for Petitioners, and
Petitioner on Part IVC *supra*.

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2004 I served a copy of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc by placing a copy in U.S. Mail, postage prepaid, addressed to the following:

Honorable Richard F. Cebull
United States District Court Judge
United States District Court for the District of Montana
James F. Battin United States Courthouse
316 North 26th Street
Billings, Montana 59101
Respondent District Court

George F. Darragh, Jr.
Assistant United States Attorney
U.S. Attorney's Office
P.O. Box 3447
Great Falls, Montana 59403
Counsel for Respondents/Defendants

/s/ Michael H. Ditton

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street, P. 0. Box 193939
San Francisco, CA 94119-3939

February 6, 2004

CA No. 04-70572 Research Air, Inc. v. USDC-MOB

A petition for writ of mandamus and/or prohibition has been received in the Clerk's Office of the United States Court of Appeals for the Ninth Circuit.

The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number when corresponding to this office relative to your case.

If the U.S. Court of Appeals docket fee has not yet been paid, please make immediate arrangements to do so. If you wish to apply for *in forma pauperis* status, you must file a motion for permission to proceed *in forma pauperis* with this court.

Pursuant to Rule 21(b), PRAP, no answer to a petition for writ of mandamus and/or prohibition may be filed unless ordered by the Court. If such an order is issued, the answer shall be filed by the respondents within the time fixed by the Court.

A copy of the docket sheet case title page is attached. Please take special note of the case caption, as it may differ from that shown on the papers submitted for filing. Pursuant to Circuit Rule 21-2, an application for writ of mandamus and/or prohibition shall not bear the name of the district court judge concerned. Rather, the appropriate district court shall be named as respondent.

Very truly yours,

Cathy A. Catterson
Clerk of Court

_____

By: Teresa Mitchell-Bell
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Circuit No. 04-70454

IN RE: RESEARCH AIR, INC., ET AL.

RESEARCH AIR, INC.; ET AL.,

Petitioners,

v.

UNITED STATES DISTRICT COURT OR THE DISTRICT OF MONTANA,

Respondent,

GALE NORTON, Secretary of the Interior, et al.,

Real Parties in Interest.

D.C. No CV-03-00054-RFC
DISTRICT OF MONTANA, BUTTE

ORDER

[Filed February 25, 2004]

Before: FERNANDEZ, W. FLETCHER and TALLMAN, Circuit Judges

Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist. Court,* 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

All pending motions are denied as moot.

DENIED.

02-25-2004 05:10pm From-9th CIR T-814 P 001/002 F-174

FAX SHEET

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Office of Staff Attorneys
95 Seventh Street
P.O. Box 193939
(415) 536-9890

DATE: FEBRUARY 25, 2004

TO: MICHAEL DITTON / GEORGE DARRAGH

TELEPHONE:

FAX #:

FROM: CECILIA DENNIS

TELEPHONE: 415-556-9890

FAX #: 415-556-8181

PAGE(S): 2, including this cover sheet.

MESSAGE: ORDER - RESEARCH AIR v USDC - MONTANA

If you have any questions concerning the transmittal of this material, please contact the sender.

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Tracking

Log-In User ID: Password: Forgot Password

Track by Tracking Number
Track by Reference Number
Import Tracking Numbers
Track by E-mail
Get Quantum View Files
Request Quantum View Notify
Void a Shipment
Help

Track by Tracking Number
Track by Tracking Number

View Details
View Details

Status: Delivered
Delivered on: Jan 30, 2004 8:48 A.M.
Signed by: YU
Location: RECEIVER
Delivered to: SAN FRANCISCO, CA, US
Shipped or Billed on: Jan 29, 2004

Tracking Number: 1Z 597 703 01 6490 686 7
Service Type: NEXT DAY AIR
Weight: 17.10 Lbs

Package Progress:

Date	Time	Location	Activity
Jan 30, 2004	8:48 A.M.	SAN FRANCISCO, CA, US	DELIVERY
	8:31 A.M.	SAN FRANCISCO, CA, US	OUT FOR DELIVERY
	6:45 A.M.	SAN FRANCISCO, CA, US	ARRIVAL SCAN
	5:27 A.M.	OAKLAND, CA, US	DEPARTURE SCAN
	3:07 A.M.	OAKLAND, CA, US	ARRIVAL SCAN
	2:05 A.M.	ONTARIO, CA, US	DEPARTURE SCAN
Jan 29, 2004	11:01 P.M.	ONTARIO, CA, US	ARRIVAL SCAN
	9:54 P.M.	COMMERCE CITY, CO, US	DEPARTURE SCAN
	8:41 P.M.	COMMERCE CITY, CO, US	ARRIVAL SCAN
	7:35 P.M.	BILLINGS, MT, US	DEPARTURE SCAN
	7:29 P.M.	US	BILLING INFORMAT RECEIVED
	6:52 P.M.	BILLINGS, MT, US	ARRIVAL SCAN
	6:10 P.M.	BOZEMAN, MT, US	DEPARTURE SCAN
	5:34 P.M.	BOZEMAN, MT, US	ORIGIN SCAN
	5:06 P.M.	BOZEMAN, MT, US	PICKUP SCAN

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street, P.O. Box 193939
San Francisco, CA 94119-3939

February 2, 2004

CA No. 04-70454 Research Air, Inc., v. USDC-MBU

A petition for writ of mandamus and/or prohibition has been received in the Clerk's Office of the United States Court of Appeal for the Ninth Circuit.

The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number when corresponding to this office relative to your case.

If the U.S. Court of Appeal docket fee has not yet been paid, please make immediate arrangements to do so. If you wish to apply for *in forma pauperis* status, you must file a motion for permission to proceed *in forma pauperis* with this court.

Pursuant to Rule 21(b), FRAP, no answer to a petition for writ of mandamus and/or prohibition may be filed unless ordered by the Court. If such an order is issued, the answer shall be filed by the respondents within the time fixed by the Court.

A copy of the docket sheet case title page is attached. Please take special note of the case caption, as it may differ from that shown on the papers submitted for filing. Pursuant to Circuit Rule 21-2, an application for writ of mandamus and/or prohibition shall not bear the name of the district court judge concerned. Rather, the appropriate district court shall be named as respondent.

Very truly yours,

Cathy A. Catterson
Clerk of Court

By: Verna Travis
Deputy Clerk

MICHAEL H. DITTON
ATTORNEY AT LAW
2210 Bridger Drive
Bozeman, Montana 59715
(406) 587-7386 (voice/facsimile)

Admitted to practice in Virginia and the District of Columbia

January 29, 2004

Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1518

Re: Petition For Writs of Mandamus and Prohibition:

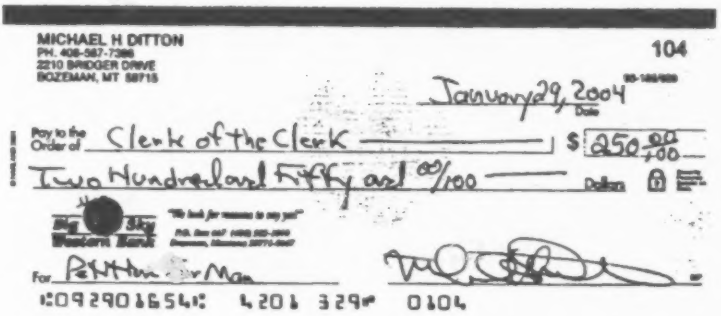
Dear Clerk of the Court:

Enclosed for filing please find the original and four copies of Petitioners' Petition For Writs of Mandamus and Prohibition and Motion for Expedited Consideration of Petitioners' Petition For Writs of Mandamus and Prohibition. A check in the amount of $250.00 for the Petition filing fee is also enclosed. If you have any questions, please call me.

Sincerely,

Michael H. Ditton
Attorney for Charles R. Arment
and Research Air, Inc.
Petitioners

Encls.



APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Circuit No. 04-70454

IN RE: RESEARCH AIR, INC., ET AL.

RESEARCH AIR, INC.; ET AL.,
Petitioners,

v.

UNITED STATES DISTRICT COURT OR THE DISTRICT OF MONTANA,
Respondent,

GALE NORTON, Secretary of the Interior, et al.,
Real Parties in Interest.

D.C. No. CV-03-00054-RFC
DISTRICT OF MONTANA, BUTTE

ORDER
[Filed February 25, 2004]

Before: FERNANDEZ, W. FLETCHER and TALLMAN,
Circuit Judges

Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist. Court,* 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

All pending motions are denied as moot.

DENIED.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Circuit No. 04-70572

IN RE: RESEARCH AIR, INC.

IN RE: RESEARCH AIR, INC., ET AL.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

Respondent,

STEVE R. SMITH, West Area Director
Office of Aircraft Services; et al.,

Real Parties in Interest.

D.C. No. CV 03-54-BU-RFC

[Filed February 17, 2004]

A review of this court's docket reflects that the filing and docketing fees for this peition for a writ of mandamus remain due. Within 14 days of the filing date of this order, petitioners shall (1) pay to the district court the $255.00 filing and docketing fees for this petition and file in this court proof of such payment or (2) file in this court a motion to proceed *in forma pauperis*. Failure to pay the fees or file a motion to proceed *in forma pauperis* shall result in the automatic dismissal of the appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

For the Court

Ila Deiss
Motions Attorney/Deputy Clerk
9th Cir. R. 27-7
General Orders/Appendix A

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street, P. 0. Box 193939
San Francisco, CA 94119-3939

February 6, 2004

CA No. 04-70572 Research Air, Inc. v. USDC-MOB

A petition for writ of mandamus and/or prohibition has been received in the Clerk's Office of the United States Court of Appeals for the Ninth Circuit.

The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number when corresponding to this office relative to your case.

If the U.S. Court of Appeals docket fee has not yet been paid, please make immediate arrangements to do so. If you wish to apply for *in forma pauperis* status, you must file a motion for permission to proceed *in forma pauperis* with this court.

Pursuant to Rule 21(b), PRAP, no answer to a petition for writ of mandamus and/or prohibition may be filed unless ordered by the Court. If such an order is issued, the answer shall be filed by the respondents within the time fixed by the Court.

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Very truly yours,

Cathy A. Catterson
Clerk of Court

_____

By: Teresa Mitchell-Bell
Deputy Clerk

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street, P.O. Box 193939
San Francisco, CA 94119-3939

February 2, 2004

CA No. 04-70454 Research Air, Inc., v. USDC-MBU

A petition for writ of mandamus and/or prohibition has been received in the Clerk's Office of the United States Court of Appeal for the Ninth Circuit.

The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number when corresponding to this office relative to your case.

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Pursuant to Rule 21(b), FRAP, no answer to a petition for writ of mandamus and/or prohibition may be filed unless ordered by the Court. If such an order is issued, the answer shall be filed by the respondents within the time fixed by the Court.

A copy of the docket sheet case title page is attached. Please take special note of the case caption, as it may differ from that shown on the papers submitted for filing. Pursuant to Circuit Rule 21-2, an application for writ of mandamus and/or prohibition shall not bear the name of the district court judge concerned. Rather, the appropriate district court shall be named as respondent.

Very truly yours,

Cathy A. Catterson
Clerk of Court

_____

By: Verna Travis
Deputy Clerk

APPENDIX J

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

Circuit No. 04-70454

IN RE RESEARCH AIR, INC., AND CHARLES R. ARMENT,
Petitioners/Plaintiffs,

v.

HONORABLE GAIL[sic] A. NORTON, Secretary, Department of Interior,
STEVE R. SMITH, West Area Director, Office of Aircraft Services,
ROBERT A. GALLOWAY, Aviation Safety Manager, Office of Aircraft Services, Department of the Interior,
UNITED STATES OF AMERICA,
and
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA,
Respondents/Defendants.

D.C. No. CV 03-54-BU-RFC
[Filed February 2, 2004]

PETITION FOR WRITS OF MANDAMUS AND PROHIBITION

I. *Relief Sought*

Petitioners Research Air, Inc. and Charles R. Arment, through their undersigned attorney, petition the Court pursuant to 28 U.S.C. § 1651 and FRAP Rules 21(a) and (c) for writs of prohibition and mandamus in aid of this Court's jurisdiction to: (1) prohibit Respondents Norton, Smith, Galloway, Interior, and United States ("Respondents") from licensing, investigating, enforcing, regulating, and sanctioning for commercial civil aviation operations in the nation's airspace; (2) compel Respondents Smith and Galloway to return Petitioners' Interior pilot card, approve their aircraft,

remove all false and derogatory information, and reinstate them on Interior's vendor approved pilots and aircraft lists; and, (3) compel Respondents to reinstate Petitioners' basic ordering agreement with Interior. Petitioners further request a writ of mandamus to compel Respondent District Court to decide their Motion For Preliminary Injunction. Petitioners and Petitioners' attorney Ditton petition for a writ of mandamus declaring local admission rules violate the Equal Protection and Supremacy Clauses and ordering Ditton admitted.

II. *Issues Presented*

1. Whether this Court must issue writs of prohibition and mandamus enjoining Interior's civil aviation licensing, investigating, enforcing, regulating, and sanctioning Petitioners' commercial civil aviation operations in national airspace as necessary or appropriate in aid of this Court's jurisdiction over the Federal Aviation and the Independent Safety Board Acts?

2. Whether the Court must issue a writ of mandamus to compel Respondent District Court to decide Petitioners' Motion For Preliminary Injunction against Respondents pending since July 10, 2003 or September 11, 2003?

3. Whether the Court should issue a writ of mandamus or prohibition ordering admission and declaring local admission rules violate the Equal Protection Clause or Supremacy Clause when resident Montana attorneys are automatically admitted if they represent Respondents or other federal parties yet exclude Petitioners' attorney unless he passes the state bar examination?

III. *Statement of Facts*

Petitioner Arment is a fully qualified Federal Aviation Administration ("FAA") licensed commercial pilot holding an FAA Part 135 single pilot commercial operator's certificate and operating specifications for a specialized low-level commercial airplane flying small business. R.1 Cmplt. at 4-5, ¶¶ 10-13; R.2. He is the president and owner of Research Air, Inc. that owns a Christen Husky two-seat airplane uniquely equipped to fly low-level wildlife, waterfowl, and fish tracking missions for the Department of the Interior's ("Interior") Fish and Wildlife Service ("FWS"), and for other federal agencies.[1] Over the course of about 12 years he has made

a large investment, about $300,000, purchased a two-seat airplane and modified the airplane to include sophisticated radio frequency detection and global positioning system equipment to enhance and make more competitive his commercial civil aviation business. Petitioners reside in Montana and flew interstate to Utah when hired by Interior to fly low-level endangered species tracking missions for the FWS Colorado River Fishery Project ("CRFP").

When he began his professional commercial flying business in 1992-93, Interior represented to Petitioner Arment that Interior had exemptions from the FAA to deviate from 14 C.F.R. § 91.119(c) (R.6) for inadvertent flight at closer distances to persons, vessels, vehicles, and structures in other than congested areas. FAA Exemption No. 5372, *In Re Interior*, FAA Reg. Doc. No. 23805, at 4 (Dec. 5, 1991, expired Dec. 31, 1993)/R.7.[2] Respondent Interior further represented to Petitioners that flying within 500 feet of obstacles and the surface was unavoidable: "low-level flight (below 500 feet AGL) may be required, 14 CFR 135.203 notwithstanding." R.9.[3] Interior requires possession of an interagency pilot qualification card ("Interior pilot card") (R.10) in addition to FAA commercial operator (Part 135), airman, and medical certificates for contract pilots.[4] 351 DM 3, ¶ 3.5D/R.12. Interior uses the card as a permit

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[1]See 350 DM 1, App. 5, # 65 (R. 3). Included within Interior's low-level special use operations, flying under 500 feet AGL category, are "Powerline Patrols," and "Animal Electronic Tracking". R. 4; 352 DM 1, ¶¶ 1.9 & 1.10B/R. 5.

[2]The last FAA Exemption for Interior from 91.11(c), for law enforcement flights, specified Interior pilots had to have "a designated observer aboard the aircraft whose sole responsibility is to assist the pilot in detecting and avoiding obstacles and other aircraft"; that "aircraft must be operated so that in the event of engine failure, a landing can be made without endangering person or property on the ground"; and, "[o]perations conducted directly over persons, vessels, vehicles, or structures and flight paths directed toward persons, structures, vessels, or vehicles below 500 feet AGL are prohibited." Exemption No. 6872, *In Re Interior FWS*, FAA Reg. Doc. No. 23805, 4-6 (Mar. 17, 1999, expired Mar. 17, 2001)/R.8. FAA decides exemption petitions through rulemaking. Exemptions grated are available at http://aes.faa.gov.

[3]Petitioner Arment has held an FAA airman pilot and medical certificates since 1975. From 1983-1992 Interior employed him as a biologist and assistant refuge manager/pilot flying hazardous low-level missions in Alaska.

[4]351 DM 3, ¶ 3.1A/R. 11. Pilot experience requirements are stated in 351 DM ¶ 3.3/R. 13. Requirements to have FAA certifications are also found in at ¶ 1.6/R.14.

to allow low-level contract commercial aircraft operations "14 CFR 135.203 notwithstanding".

Interior publicizes on the Internet lists of qualified contract pilots and aircraft (available at http://www.oas.gov/source). Interior requires all ordering offices to ensure a contract pilot possesses the Interior pilot card and is listed on the approved vendor and pilot lists before contract flights.[5] Petitioners structured and developed their business based on government low-level flying contracts. Interior's actions took Petitioners' investment; they are out of business.[6]

In December 2001 Interior FWS CRFP hired Petitioners to fly in the nation's air space interstate from Montana to Utah, and to fly low-level during the day under visual flight rules over the Green River located in Utah.[7] Low-level flying is necessary when tracking fish in a river to locate fish habitats using radio telemetry operated by a FWS biologist passenger who searches for unique codes in frequencies emitting from the fish embedded with radio transmitters. R.17 ("anywhere from 50 to 200 feet"); R.7 at 2 (FAA: "[FWS Butler] states it is necessary to fly at 150 feet above ground level (AGL) to accurately count and identify waterfowl species ..."). Petitioner Arment had to fly as low as 50 feet AGL on December 13, 2001 to locate the endangered species Colorado pike minnow for FWS because of weak frequencies emitting from the fish. R.18 at 12, ¶ 17. He successfully accomplished Interior's mission to locate endangered species on December 13, 2001. R.19 ("eight fish were located on 13 December 2001"); R.20 ("we did locate a fish as we passed these wires"). More than 30 days later, on January 25, 2002, Interior made full final payment for Petitioners' December 2001 task contracts successful completion, including the December 13th flight. R.21.

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[5]*See* R. 15/353 DM 2, ¶ 2.4B, ¶ 2.5B(1). This includes *all* low-level federal flight contracts Petitioners might bid or propose on. No card, no contract. State and tribal organizations that would hire pilots to fly low-level tracking missions aware of an Interior pilot card suspension would not hire the suspended pilot.

[6]Petitioner Arment testified Research Air cannot survive with less than 150 hours low-level flying per year and he has only realized less than $1,200 since May 6, 2003. His expenses since January 1, 2003 are over $18,000, including legal expenses. "At this rate. Research Air is out of business." R.16 at ¶ 12.

[7]*See FWS Region 6 Mountain-Prairie Utah Briefing Book* at 7 (available at http://mountain-prairie.fws.gov/reference/briefing_book_ut_2000.pdf).

During that flight while tracking the endangered Colorado pike minnow Petitioner Arment maneuvered to clear from below unmarked powerlines across the river. He safely did so applying FAA published guidance by maintaining a distance interval of about 80 to 120 feet from the obstacle. The FWS biologist passenger Kitcheyan, intent on locating the fish did not even notice the powerlines. Petitioner Arment also rolled the landing gear wheels of his airplane on the frozen river, a routine matter for him given his Alaska OAS training and experience landing on various frozen rivers and lakes, and in a manner so smooth that the passenger did not notice the powerline or the landing gear touch the ice. Neither thought this an aviation occurrence. R.22; Pet. 19 (Kitcheyan: "right back to doing my job", "never really fazed me", "I didn't feel affected"). Only later, in casual conversation during a January 2002 fishing trip, was this mentioned and another FWS employee asked about reporting to OAS. Neither the FWS biologist and his supervisor nor pilot Arment believed a SAFECOM matter was involved, and FWS did not submit a SAFECOM to OAS until March 5, 2002.[8]

Office of Aircraft Services ("OAS") in Boise, Idaho has a form used by FWS when asking Petitioner Arment what is reportable defining "Aircraft Incident" as having "the potential or resulting in an accident: 'Examples are…Near Mid-Air Collision - When an airborne aircraft encroaches within 500 feet of another airborne aircraft." R.26.[9] FAA lists seven aviation incidents reportable, if FAA requests a report. 14 C.F.R. §§ 830.15(a) & 830.5(a). None of these involve safely avoiding a powerline. FAA regards power lines as obstacles and navigation obstructions, distinguishing powerlines from their "supporting structures". FAA *Aeronautical Information Manual* ("AIM") § 7-5-3c. AIM § 7-5-3a states:

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[8]Interior has a duty and represented to Petitioners Interior would assess risks and provide pilots a map showing flight hazards including all wires. R.5 at ¶¶ 1.9D & C.

[9]Interior and FAA define "aircraft accident" and "incident" the same. Neither applies to Petitioners. *See* R. 3 at ## 5 & 32. Interior, however, has many additional safety terms: "aviation hazard," *id.* at # 28; "airspace conflict," *id.* at # 8; "incident with potential,"; *id.* at #33; and, "Mishap, Aviation Mishap," *id.* at # 43. FAA has no such definitions.

> While 14 CFR 91.119 allows flight below 500 AGL when over sparsely populated areas or open water, such operations are very dangerous. At and below 200 feet AGL there are numerous power lines, antenna towers, etc., that are not marked and lighted as obstructions and; therefore, may not be seen in time to avoid a collision.

AIM § 7-5-3c describes powerlines as obstacles and *potential* flight hazards that "often span approaches to runways, natural flyways such as lakes, rivers, gorges, and canyons," are "virtually impossible to see under certain conditions," and "do not exceed 200 feet AGL". R.27.

Respondents excluded Petitioners from further commercial flight contracts on March 26 and 27, 2002. R.28. By letter dated March 27, 2002, Respondent Galloway, OAS Aviation Safety Manager ("ASM"), before Petitioner Arment's interview, determined he was guilty of "a serious aviation hazard" and had Petitioner Arment give him his Interior pilot card. He stated:

> It has been determined that during this flight to locate fish while using radio telemetry equipment you flew under a set of power lines on the Green River and contacted the surface of the frozen river. This event represents a serious aviation hazard as defined in the Office of Aircraft Services' Aircraft Rental Agreement (ARA) paragraph C 10.1.2, and is being investigated as an Incident With Potential in accordance with ARA paragraph C 10.1.6.

R.29. Respondent Galloway is not a contracting officer, nor is he a suspension or debarring official. OAS then "investigated" for over 14 months while continuing to suspend and exclude Petitioners from flying low-level commercial flights. Interior made no report to FAA. There is no FAA involvement in these events. Interior asserts "oversight responsibilities which must be performed" that surpass FAA.[10] Interior also asserts their commercial civil aviation opera-

[10]R. 32 at ¶ 1. However, when denying Interior an exemption from federal aviation regulations in 1999 FAA stated: "The FAA finds that the Petitioner has not provided procedures or alternatives that would provide a level of safety equivalent to the rule; therefore, FWS' request for relief from Section 91.119(b) is hereby denied.". This was upon Interior's representations about OAS's "strong aviation management and safety program" (that does not mention the Interior pilot card). FAA Exemption No. 6872 at 3-4/R. 8.

tions are "beyond the scope of FAA scrutiny." R.32. Before interviewing Petitioner Arment or completing the investigation the OAS Director -- Respondent Smith's superior—reported to Washington, D.C. FWS higher headquarters an "Incident With Potential" had occurred stating "[t]his event represents a serious aviation hazard". R.31 at 1.

Meanwhile, Mr. Arment passed his FAA commercial pilot flight check on March 29, 2002 (R.18 at Ex. 1) and again on April 22, 2003 (R.16 at Ex. 2) without any unsatisfactory marks. Six months before the December 13, 2001 flight, Mr. Arment had passed an OAS low-level flight evaluation, also without any unsatisfactory marks (R.18 at Ex. 2), flying within 500 feet of powerlines. From 1992 through 2001 Petitioner Arment has never received any unsatisfactory marks on FAA or OAS flight evaluation checks. Although OAS's rules require a flight check upon suspicion of unsafe piloting following "incident with potential", 351 DM ¶ 3.4E/R.11, Interior refused to evaluate his flying skills and safety with an OAS flight check before, during or after the alleged "incident with potential."

Fourteen months after suspending his Interior pilot card and excluding Petitioners from federal flight contracting, on May 6, 2003, Respondent Smith sent Petitioners a three-page letter wherein he continued the suspensions and exclusions, and imposed additional sanctions against Petitioners with several conditions for potential reinstatement. In pertinent part, he stated:

> 1. You willing operated the aircraft at an altitude that resulted in the situation where you were forced to evade power lines and this altitude was not uncommon to the standard profile you had used on previous similar missions. ...
>
> 2. You intentionally flew under a set of power lines that are estimated to range between 60 and 165 feet above the terrain. In doing so you actually came in contact and made tracks on the frozen river below the wires. ...
>
> 3. You attempted to minimize and downplay this event and in fact, based on interviews, told the passenger and the dispatcher that the event was not an "incident." ...

R.33 at 1-2.[11] Respondent Smith is not a contracting officer, nor is he a suspension or debarring official. The Contracting Officer exercised no authority regarding these allegations although determinations of a federal government contractor's responsibility is vested solely in the Contracting Officer, or the SBA, by statutes, 48 C.F.R. § 1.601 & Part 9.[12] She took no action against Petitioners whatsoever. Respondent Smith explicitly sanctioned Petitioners for violating 14 C.F.R. § 91.119(c). R.29, 30 & 33. The statutory authority for those regulations is the Federal Aviation Act, 49 U.S.C. Part A. He also states that only after Petitioners complete expensive formal training courses in civil aviation matters and fly 200 hours low-level over at least one year, all at Petitioners' expense:

> ...you may request a post Incident-with-Potential flight evaluation. If successful, you will be issued a letter stating your eligibility for consideration as an OAS approved pilot if an award is made to your company in the future.

R.33 at 3. If he "successfully requests" an evaluation he may get a letter, not his card back. If Petitioners had "additional substantive evidence" they could appeal.

Petitioners sought relief from Secretary Norton. R.36. No response was forthcoming. Respondent Smith refused to provide a copy of the administrative record, the investigative report, statements or "other OAS information". R.1; R.37 at 5. Apart from the Smith and Galloway letters and Petitioner Arment's interview transcript, Interior disclosed none of this information to Petitioners until upon court order Respondents filed an administrative record (uncertified) in the district court.

Petitioners filed their complaint on July 2, 2003 in federal district court with their motion for preliminary injunction and requested the district court issue a TRO. R.1; 38, 39. Petitioners alleged Respondents had no lawful authority to impose and revoke the pilot card

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[11]Interior's "ARA" is a basic ordering agreement. *See* OPM No. 03-30, ¶ 3.A/R. 34 ("Replace the term "Basic Ordering Agreement (BOA)", with "Aircraft Rental Agreement (ARA)" wherever it appears in the Departmental Manual."). A basic ordering agreement is not a contract. *Modem Systems Technology*, 979 F.2d 200 (Fed. Cir. 1992) ("does not create any enforceable obligations between either party"); R. 35 at ¶ C6.3. ARAs are not negotiated procurements.

grounding Petitioners from commercial operations, that Respondents violated the Federal Aviation Act and regulations by unilateral determinations of FAA violations, and that Respondents illegally suspended, excluded and *de facto* debarred Petitioners from federal government contracting. The district court denied the TRO on July 9, 2003, stating Petitioners failed to satisfy Rule 65(b) "because the facts set forth in their affidavit or verified complaint do not demonstrate 'immediate and irreparable injury, loss, or damage'. Instead, Plaintiffs detail events that happened a year ago or more." R.40 at 2. The Court also denied Petitioners' attorney Ditton, who also represents Petitioners before the GAO,[13] admission *pro hac vice* citing L.R. 83.3(e)(2) that excludes resident attorneys. At the preliminary injunction hearing on July 24, 2003, the court ordered filing of an administrative record. R.41. During the hearing Judge Cebull stated he would consider waiving the local admission rules.

Petitioners had served the federal defendants on July 7, 2003 in their official capacities. Respondents opposed preliminary injunctive relief on July 23, 2003. R. 42. Individual defendants Smith and Galloway refused to waive service of process. Petitioners then had to have them personally served in Idaho, accomplished on October 20 and 23, 2003, after several attempts. R.43. After the administrative record was filed on August 18, 2003, Petitioners filed on September 11, 2003 a supplemental response and reply to Respondents' opposition to the preliminary injunction motion to which Respondents had no reply. Respondents filed a motion to dismiss on September 5, 2003 (R.44) and Petitioners responded on September 16, 2003. On September 29, 2003 Petitioners' attorney Ditton moved the district court to waive the local admission rules for his full admission. R.45. Respondent District Court denied the motion because Ditton was a Montana resident and "had not taken and passed the Montana bar examination:"

> An attorney who resides in Montana *must* be a member of the State Bar in order to practice in its federal courts. This is a simple rule. While Mr. Ditton's argument pertaining to the inequality of Local Rule 83.3's residency requirement of United States Attorneys and non-United States Attorneys

[13]Comp. Gen. B-292589. Upon Interior's motion to dismiss, GAO dismissed on August 12, 2003 stating, "the matter involved is currently pending before a court of competent jurisdiction.".

> is interesting, it will not be addressed here. A simple remedy is available to Mr. Ditton that would permit him to practice law in the State of Montana, and, thus, in Montana's federal courts—obtain a license to do so by successfully passing the Montana bar examination.

R.46 at 1-3 (emphasis in original). He issued no ruling on Petitioners' motion for preliminary injunction, instead, on January 7, 2004 he scheduled a hearing on Petitioners' local counsel withdrawal motion for January 30, 2004. R.47; 48.[14]

IV. *Reasons Why the Writs Should Issue*

This Petition satisfies at least four of the five factors set forth in *Bauman v. United States*, 557 F.2d 650, 654-55 (9th Cir. 1977) for Part A - C below. Petitioners do not contend that Respondent District Court's orders are oft-repeated error or manifest a persistent disregard of federal rules. Petitioners do contend Interior's actions manifest a persistent disregard of statutes and the Constitution.

A. *Respondents'* Ultra Vires *Actions Demand Injunction*

As accused and sanctioned violators of federal aviation safety regulations by the wrong agency acting *ultra vires* and clearly erroneously as a matter of law Petitioners are entitled to injunctive relief in this Court. *TVA v. Hill*, 437 U.S. 153, 194 (1978) (injunction necessary to effectuate congressional purpose behind the statute); *Sierra Club v. Marsh*, 816 F.2d 1376, 1383-84 (9th Cir. 1987). This Petition invokes this Court's present concurrent jurisdiction to protect future or prospective judicial review under the federal aviation statutes. *FTC v. Dean Foods Co.*, 384 U.S. 597, 608 (1966) (28 U.S.C. § 1651(a) power to protect prospective jurisdiction); *Whitney Nat'l. Bank v. New Orleans Bank*, 379 U.S. 411, 426 (1965) ("ample power to do so"); *Roche v. Evaporated Milk Assoc.*, 319 U.S. 21, 25 (1943) ("although no appeal has been perfected").

This is an extraordinary agency case. Respondents' licensing, investigating, enforcing, regulating, and sanctioning Petitioners when operating aircraft in civil aviation within United States' airspace per-

[14]Respondents sent Petitioners' local counsel Respondent District Court's decision in a different case requiring a *pro se* party to obtain an attorney to represent his corporation. R.58. Thirty days later local counsel filed their motion to withdraw.

sistently violates clear Congressional commands giving the FAA and NTSB exclusive jurisdiction pursuant to the Federal Aviation Act and the Independent Safety Board Act. Interior's actions facially violate federal statutes causing and threatening injury to law-abiding Petitioners that is irreparable injury. *See* notes 6 *supra* and 22 *infra*. Interior chose not to proceed by making a report to the FAA that, if FAA had in turn complained, would have provided Petitioners due process of law before NTSB with judicial review in this Court. Although Petitioners sought relief in district court that court fails to rule.[15]

Petitioners have a clear right to the relief sought, and there is a plainly defined and peremptory duty on the part of recalcitrant Respondents to refrain from their manifestly illegal acts. Respondents trumpet authority surpassing FAA and NTSB—"higher safety standards," "oversight responsibilities" for civil aviation operations "beyond the scope of FAA scrutiny." There is, however, no uniquely Interior airspace in the United States. This is case is about regulation of the nation's airspace, not public land use. Interior's intrusions into FAA's exclusive regulatory jurisdiction are plainly illegal. Congress declared federal sovereignty of airspace over the United States, granting a "public right of transit through the navigable airspace", vesting exclusive authority to FAA. 49 U.S.C. § 40103(a)(1) & (2); *United States v. Varig Airlines*, 467 U.S. 797, 813-14 (1984) (vested in FAA "all regulatory authority over aviation safety").[16] Congress' purpose to achieve civil aviation uniformity and expertise for national airspace commerce and safety is too important to tolerate Respondents' officious intrusions. Respondents lack any statutory authority for their adverse actions having pernicious and unconstitutional effects on Petitioners and must be enjoined.

Respondents interpose no regulatory or statutory authority for their actions. This Court must protect its FAA jurisdiction from the meddling agency and rogue officers. *Board of Governors v. Transamerica*

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[15]Petitioners otherwise have no private cause of action precisely because of the Federal Aviation Act's comprehensive regulation and enforcement. *In re Mexico City Aircrash*, 708 F.2d 400, 406-08 (9th Cir. 1983).

[16]*Westside Prop. Owners v. Schlesinger*, 597 F.2d 1214 (9th Cir. 1979) (FAA "authority to regulate the use of all airspace over the United States by both civil and military aircraft"); *U.S. v. Red Frame Parasail*, 160 F. Supp.2d 1048 (D.Ariz. 2001) (accepting United States' position FAA regulates airspace below 500 feet AGL).

Corp., 184 F.2d 311 (9th Cir. 1950) (*per curiam*) (granting writ of injunction in aid of the court's Federal Reserve Board jurisdiction).[17] *See Duke Energy Trading and Marketing v. Davis*, 267 F.3d 1042, 1056-59 & n.11 (9th Cir. 2001) (governor's commandeering orders "effectively rewrote the terms of the CTS rate schedule" that "fall well within FERC's exclusive jurisdiction over interstate wholesale electricity sales"). Civil aviation expertise regulating the nation's airspace remains exclusively lodged in Department of Transportation. Just as a federal agency cannot relinquish this Court's jurisdiction, *National Parks and Conservation Assoc. v. DOT*, 222 F.3d 677 (9th Cir. 2000); *National Parks and Conservation Assoc. v. FAA*, 998 F.2d 1523, 1527-28 (10th Cir. 1993); *California Save Our Streams Council*, 887 F.2d 908, 912 (9th Cir. 1989), another agency cannot usurp it. An agency "literally has no power to act...unless and until Congress confers power upon it." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986).[18] *See Escondido Mutual Water Co. v. La Jolla Bands of Mission Indians*, 466 U.S. 765, 780-81 (1984) (FERC rejecting Interior's prescriptions that on their face exceed statutorily defined geographic limits on Interior's jurisdiction).

Respondents deprive Petitioners of due process of law, their FAA approved commercial licensed flying business, and publicly stigmatize Petitioner Arment as an unsafe pilot. *Greene v. McElroy*, 360 U.S. 474 (1959) is authority for holding unconstitutional license

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[17] *See Telecommunications Research & Action v. FCC*. 750 F.2d 70 (D.C. Cir. 1984) (suits seeking relief affecting future statutory review, citing *Board of Governors I: Nevada Airlines. Inc. v. Bond*, 622 F.2d 1017, 1019-20 (9th Cir. 1980) (*per curiam*) (even though administrative remedies remain available). Respondents' claim that "the actions complained of...are fully authorized by the parties' agreement" (R. 42) is plainly wrong and cannot insulate them from this Court's powers. *Board of Governors*. 184 at 317 ("Even if the contracts had been arrived at by parties dealing at arms length, it requires no demonstration that an act which otherwise might be enjoined, does not become immune to injunction because a party defendant has made a contract to do the thing forbidden").

[18] *University of the D.C. Faculty Ass'n v. D.C. Fin Resp. & Mgt. Assist. Auth.*, 163 F.3d 616, 621 (D.C. Cir. 1998) ("Appellants' premise—that the [agency] has the authority to do anything that is not expressly prohibited by [the governing statute]—is quite extraordinary and we reject it."); *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988) ("the Veterans Administrator cannot issue oil drilling permits—nor can the Secretary of Labor rescind television licenses—and expect to escape judicial review by hiding behind a finality clause.")

revocation done without statutory authority by a federal agency. There is no principled difference between the *ultra vires* revocation of a federal security clearance permitting a professional aeronautical engineer to work on classified government aircraft projects and revocation of an Interior pilot card permitting a professional pilot to fly low-level special use government operations.

Respondents violate 49 U.S.C. Part A & 14 C.F.R. Part 67 and the APA, 5 U.S.C. §§ 551(8) & 554, by using the Interior pilot card improperly as a license to permit and forbid commercial flights in the nation's airspace exclusively regulated by FAA. *CAB v. Delta Air Lines, Inc.*, 367 U.S. 316 (1961) held that a certificated commercial airline carrier's operations could not be curtailed without notice or hearing because the aviation statute clearly provided for notice and hearing "as hereinafter provided.'" *Id.* at 324-25.[19] *See Gorbach v. Reno*, 219 F.3d 1087, 1102 (9th Cir. 2000) (*en banc*) (administrative power "must be exercised within the authority granted by the governing statute"); *American Rivers v. FERC*, 201 F.3d 1186 (9th Cir. 2000) (rejecting Interior "veto power"); *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 663 *n.*3 (D.C. Cir. 1996). Here, Respondents effectively suspended Petitioners' FAA commercial certificates conditioning their use with unauthorized requirements, all without notice and hearing. Petitioners are fully FAA commercially qualified by inspection, training, safety record, and experience, and are presently entitled to unfettered use of their FAA certificates. *Mendenhall v. NTSB*, 92 F.3d 871, 876 (9th Cir. 1996), *as mod.* 213 F.3d 464 (9th Cir. 2000) (FAA could not deny airline transport pilot certificate to pilot who passed competency check, and "ten days without a license is not 'a reasonable period of time,' when one's livelihood depends upon it."). Interior maintains false and derogatory information about Petitioners' civil aviation in public records. *Compare* R.16 at ¶ 3-4, 6 *with* R.31, 53 & 54. *See Stidham v. Peace Officer Standards &*

[19] *See United States v. Seatrain Lines*, 329 U.S. 424, 432-33 (1947) (no authority to alter carriers certificate fixing terms and conditions); *Barry v. Barchi*, 443 U.S. 55 (1979) (unconstitutional to suspend horse trainer's license without pre-deprivation hearing); *Bell v. Burson*, 402 U.S. 535 (1971) (cannot suspend driver's license without a hearing on fault); *Oceanair of Florida vs. DOT*, 876 F.2d 1560 (11th Cir. 1989) (no regulatory authority to revoke air carrier's certificates without hearing on the record); *Collord v. Department of the Interior*, 154 F.3d 933 (9th Cir. 1998) (Constitution requires a hearing before Interior can cancel mining claims).

Training, 265 F.3d 1144 (10th Cir. 2001) (*ultra vires* acts effectively revoking peace officer's certificate, foreclosing employment opportunities by circulating unproven damaging information). Petitioners are not Delta Airlines, but they have a constitutional right to try and become such, developing their aviation business as they see fit complying with FAA regulations uninhibited by Interior's arrogant self-proclaimed "oversight responsibility" over national airspace.

Leedom v. Kyne, 358 U.S. 184 (1958) is authority for empowering Article III Courts to hold Respondents' statutory violations illegal even when judicial review is otherwise precluded. By investigating and redefining aviation safety terminology to regulate Petitioners' conduct during commercial flights in the nation's airspace Respondents violated 49 U.S.C. Part A, 14 C.F.R. Part 135, and 49 U.S.C. § 1131(a)(1)(A) & (F). Unbeknownst to Petitioners then, Interior's 14 month "incident with potential" safety investigation is unlike NTSB investigations. Interior OAS combines its *ex parte* investigations with sanctions using Petitioner Arment's investigation statements. NTSB does not. Under the Independent Safety Board Act, Transportation separates investigations of aircraft accidents or crashes involving flight safety violations from pilot and airline sanctions to further independence and formulate safety regulations. 49 U.S.C. § 1153 & § 1903(a) (1).[20] Interior's unilateral determination of liability for civil commercial aircraft operations and pilot conduct redefining aviation safety terms and reportable incidents under the guise of a contractor safety investigation violates this statute. NTSB has the *exclusive* statutory authority to "prescribe requirements for persons reporting accidents and aviation incidents". 49 U.S.C. § 1116(b)(3).

By unilaterally determining violations of the federal aviation regulations Respondents also violated 49 U.S.C. Part A and 14 C.F.R. Parts 91 & 135. Claims of violations of the federal aviation regulations and safety standards must proceed according to the Federal Aviation Act. *Alameda v. FAA,* 285 F.3d 1143, 1145 (9th Cir. 2002) ("§ 46110(a) encompasses orders relating to air safety."); *Arapahoe County Pub. Airport Auth. v. FAA,* 242 F.3d 1213 (10th Cir. 2001) (proclaimed "safety" and "civil aviation needs" factual matters for

[20] *See Gibson v. NTSB*, 118 F.3d 1312, 1314-15 (9th Cir. 1997) (*per curiam*); *Graham v. Teledyne-Continental Motors,* 805 F.2d 1386, 1389 (9th Cir. 1986).

the FAA); *Fairview v. DOT*, 201 F. Supp.2d 64 (D.D.C. 2002) (factual basis for § 91.119 violation must be determined through FAA). *See Edwardsen v. Department of Interior*, 268 F.3d 781, 784 (9th Cir. 2001) (circuit jurisdiction over violation arising under OCSLA).

While clearing the obstacle from below Petitioner Arment demonstrated he was in a position to make a safe landing as he rolled the landing gear on the frozen river showing he could make a safe landing, to Respondent Smith that "indicates either a failure on your part to recognize an extremely hazardous situation or a willing misrepresentation of that hazardous situation."[21] Yet FAA told Interior this safe landing standard was applicable to Interior's exemption for low-level flying.[22]

FAA safety regulations do not prohibit conduct that Interior defines as "aviation hazard," "incident with potential," and "mishap". Interior's plethora of vague and confusing aviation safety terms, rules and definitions impermissibly contradict FAA safety regulations and guidance.[23] Respondent Smith is not an NTSB ALJ. None of the FAA listed incidents approximate safely avoiding an obstacle with ample distance. Respondents' litigation position is that "... if it is reported that a pilot commits any act related to safety, the pilot card is suspended pending investigation of the incident in question and the pilot cannot be used under the ARA." R.42 at 5. "Any

[21]R.33 at 2. This is not a case involving recklessness. According to their unilateral superior enforcement authority if reckless Respondents would have charged Petitioners with a violation of 14 C.F.R. § 91.13, but did not.

[22]Note 2 *supra.* Sanctions are also clearly erroneous because all OAS interviewees who had flown with Arment praised him. R.48 ("excellent pilot," "strong person on safety…I feel confident with Randy when we're flying"); R.49 ("real smooth…everything went well" (reporting his subordinate's statements); R.50 ("I would not fly with a different pilot…very safe pilot…I felt very secure with him").

[23]Respondents' employees interviewed had great difficulty with OAS's peculiar "higher safety standards". R.54 ("I took the class…I just didn't know about SAFECOM", "maybe if there was another plane in the air and we had a near-miss or lets say the waterfowl…if we almost had a near accident, …compromise the ability of the plane or the helicopter to land safely…"); R.56 ("I don't recall discussion of the SAFECOM program…very subjective…threat of an accident or the potential threat of an accident that would be an incident…neither Chris nor I really felt confident with the definition of an incident").

act relating to safety" must mean Interior suspends pilots for safe acts, as happened here, which is nonsense.

Interior's interpretation of "potential" to mean "unsafe" inflicts upon commercial pilots an unauthorized revision to the FAA aviation regulations and guidance.[24] At their unrestrained whim Interior's redefines an FAA *potential* flight hazard to mean an "aviation hazard" and a "mishap"; powerlines to mean structures, not obstacles; and, FAA recognized potential inadvertent flight at closer distances than FAA aviation regulations allow while flying hazardous low-level missions (R. 7 at 4) to mean a reportable "aviation hazard," an "incident with potential," a "mishap," and a sanctionable *per se* violation of FAA aviation regulations.[25]

Respondents' positions are disingenuous. Interior has a below 500 feet AGL special use category for "powerline patrols"! R.4. When hiring Petitioners Interior knew from petitioning FAA and FAA exemptions granted to Interior that Interior had no permission from FAA to violate § 91.119(c) by flying intentionally closer than 500 feet to powerlines *if* Interior genuinelv believed powerlines were structures and not obstacles. Interior's low-level missions continue as necessary to protect endangered species. If flying closer than 500 feet to powerlines is an aviation hazard or structure Interior cannot fly low-level to locate endangered species in a river as Interior emphasizes: "[b]ureau projects often dictate that flights be conducted in close proximity to the ground where wires are prevalent." R.5. If powerlines are structures Interior cannot fly low-level at all because they are in "close proximity."[26]

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[24]Interior's peculiar and wrong interpretations of federal aviation regulations are due no deference from any court. *National Park Hospitality Assoc. v. Interior,* 534 U.S.__,__ (2003) ("NPS is not empowered to administer the CDA"); *U.S. Air Tour Assoc. v. FAA*, 298 F.3d 997 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1783 (2003) (no deference for FAA's interpretations of Interior's statutory terms.

[25]Government civil pilots do not violate § 91.119(c) by flying lower than 500 feet. *See Florida v. Riley*. 488 U.S. 445, 451 (1989) (different case if flight was contrary to law or regulation); *United States v. Van Damme*, 823 F. Supp. 1552, 1559 (D.Mont. 1993) (helicopter fly-overs less than 500 feet not violating the law).

[26]Interior also states itself and all contract pilots do not have to comply with 14 C.F.R. § 135.203(a)(l)'s prohibition of operating an aircraft under visual flight rules below 500 feet above the surface or less than 500 feet horizontally from any obstacles. This too is consistent with powerlines being obstacles.

Interior's inept unauthorized damaging actions defeat Congressional purpose. Interior understood FAA's emphatic concern for providing a designated observer to detect obstacles such as powerlines in sufficient time to avoid. Rather than furnish designated observers and a map showing the location of powerlines, Interior conveniently redefined powerlines as structures instead of obstacles, and as reportable hazards instead of potential hazards to be safely avoided. Respondent Smith simply fabricated his own new substantive flight rule depriving FWS of their safest pilot for endangered species missions. Interior made scapegoats of Petitioners and impermissibly punished them. *L.P. Steuart & Brothers, Inc. v. Bowles*, 322 U.S. 398 (1944) (suspension cannot be used as punishment); *In re Monroe Communications Corp.*, 840 F.2d 942, 946-47 (D.C. Cir. 1988), *cert. denied*, 502 U.S. 906 (1991) ("singling someone out for bad treatment").

Respondents enforce aviation safety regulations as "a matter of contract (or more precisely) ARA administration." R.54 at ¶ 21. Under the cover of "ARA administration" Interior impermissibly regulates commercial aviation economic matters Congress entrusted to the FAA. 49 U.S.C. § 1371; *Las Vegas Hacienda, Inc. v. CAB*, 298 F.2d 430, 432 (9th Cir.), *cert denied*, 369 U.S. 885 (1962) (FAA, not air carrier, defines air commerce). *Cf. Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594 (D.C. Cir. 1993) (FAA airline inspection basis for DOD hearing authorized by military statute). Further, ordering Interior to cease encroaching upon FAA's jurisdiction in civil aviation through *ultra vires* acts in derogation of the federal aviation statutes is also consistent with preemption doctrine [27] and Federal Tort Claims Act decisions deferring to FAA standards.[28]

B. *No Decision or Priority for Preliminary Injunction*

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[27] *See e.g., Baggett v. Florida Dep't. of Prof. Reg.*, 717 F.2d 521, 523-24 (11th Cir. 1983) (federally licensed pilot conforming to federal regulations); *Hughes v. Eleventh Judicial Circuit*. No. 03-21300 (S.D.Fla. Aug. 5, 2003) (interstate flying with FAA commercial pilot certificates preempt state DUI prosecution).

[28] *See e.g. Varig Airlines, supra: Mitchell v. United States*, 787 F.2d 466, 468 (9th Cir. 1986), *cert. denied*. 484 U.S. 856 (1987); *Reminga v. United States*, 631 F.2d 449, 458 (6th Cir. 1980); *Mellott v. United States*, 808 F. Supp. 746, 748 (D. Mont. 1992); *Baker v. San Carlos Irrig. Proj.*, No. Civ. 00-2380 (D.Ariz. Dec. 11, 2001).

Plaintiffs have a clear and indisputable right to the relief sought. 28 U.S.C. § 1657. *See Williams v. Simons*, 355 U.S. 49 (1957) (*per curiam*) (order to show cause why writ should not issue for refusing to decide state's preliminary injunction motion); Ninth Circuit Rules 3-3; 34-3. Refusal to decide or have another injunction hearing deprives Petitioners of FRCP 65, their § 1657 right of priority, and appeal rights under 28 U.S.C. § 1291. Mandamus relief from this Court is necessary. *Ex Parte Bradstreet*, 32 U.S. (7 Pet.) 634, 647 (1833) (refused to let plaintiff give evidence in court about value of claimed property) (Marshall, C.J.); *Thermtron Products Inc. v. Hermansdorfer,* 423 U.S. 336, 352 (1976) ("to direct a subordinate Federal court to decide a pending cause").[29]

Respondent District Court's refusal to decide when Respondents' *ultra vires* and unconstitutional acts, and statutory violations are clear is inexcusable and causes Petitioners further irreparable injury. Respondent District Court's *sub silentio* denial of preliminary relief is clearly erroneous as a matter of law for all the reasons set forth in Part IVA, *supra*, including irreparable injury. Such denial also violates the preliminary relief standard. *Baby Tam & Co. v. Las Vegas*, 154 F.3d 1097, 1102 (9th Cir. 1998) (licensing ordinance with no prompt hearing and judicial review unconstitutional, "100% probability of success on the merits").

Respondent District Court's inaction constitutes an abdication or usurpation of judicial power. *North Bonneville v. District Court*, 732 F.2d 747, 752 (9th Cir. 1984) ("The erroneous transfers created exceptional circumstances amounting to "judicial usurpation of power" by the District Court.", citing *Will v. United States*, 389 U.S. 90, 95 (1967)). Petitioners are left in administrative and judicial limbo in a case where their constitutional and statutory rights clearly entitle them to injunctive relief. Respondents' arguments for not granting Petitioners' relief are makeweights. They seem more intent on stalling, delaying and protracting the case to exhaust Petitioners financially and emotionally. On October 20, 2003, they sent Petitioners' local counsel a letter with attachments that included Respondent District Court's recent decision requiring a *pro se* party

[29] *See In re Life and Fire Ins. Co.*, 8 Pet. 291 (1834) (refusal to sign judgment leaving parties in limbo); *Beacon Theaters v. Westover*, 359 U.S. 500 (1959) (refusal to grant jury trial).

to obtain an attorney to represent his corporation. Thirty days later Petitioners' local counsel filed a motion to withdraw. R.47. The court now gave that motion priority over Petitioners' the preliminary injunction motion that could have averted the withdrawal motion.

C. *The Local Admission Rules Are Unconstitutional*

This Court has mandamus jurisdiction to review the constitutionality of Respondent District Court's Local Rules for *pro hac vice* admission and the denial of admission to Petitioners' attorney Ditton. *Gallo v. United States District Court*, 349 F.3d 1169, 1177 (9th Cir. 2003). This court also has plenary supervisory power over the local admission rules adopted by Respondent District Court pursuant to 28 U.S.C. § 2701 where there is clear basis in fact and law. *Gallo*, 349 F.3d at 1187, citing *Frazier v. Heebe*, 482 U.S. 641, 646 (1987) (local rule requiring members of Louisiana state bar either reside or maintain an office in Louisiana "unnecessary and irrational"); *Russell v. Hug*, 275 F.3d 812, 817 (9th Cir. 2002) (distinguishing local rule not enacted pursuant to § 2701).

L.R. 83.3 states the local rules for admission to the federal district bar of Montana including the bankruptcy court. L.R. 83.3(c) prohibits practice in the district court unless admitted. L.R. 83.3(a) limits admission to the district court bar "to attorneys of good moral character who are members in good standing of the State Bar of Montana." L.R. 83.3(d) automatically admits to practice all resident Montana attorneys who are not members of the Montana State Bar "in any matter in which that attorney is employed or retained by the United States or its agencies and is representing the United States or any of its officers".

The local rules provide a savings clause in L.R. 8.3(e)(2) stating "Unless authorized by the Constitution of the United States or acts of Congress," that Respondent District Court failed to invoke. When denying Petitioners' attorney Ditton admission with waiver the District court stated it doubted its authority to waive local rules. He clearly had such authority. *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 342, n.1 (9th Cir. 1993).

L.R. 83.3 is unconstitutional on its face because the rule does not treat all Montana residents attorneys alike without a rational basis. As applied to Ditton as a class of one it discriminates irra-

tionally against him. *See Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). Montana resident attorneys representing federal parties are automatically admitted. Montana resident attorneys representing parties against the federal government are excluded and cannot be admitted *pro hac vice*. Respondent District Court's basis for upholding the Montana state bar membership requirement is passing the Montana bar examination. That basis is irrational because many resident Montana attorneys who are members of the Montana state bar have taken no bar examination at all. Until after 1980, law school graduates of the University of Montana were admitted to the Montana State Bar without passing any multi-state or state bar examination.[30] *Matter of Bar Examination*, 187 Mont. 159, 609 P.2d 263 (1980). The local rules do not require these resident attorneys to pass a bar examination, only that they have membership in the state bar. Moreover, Montana resident attorneys who have not passed any bar examination are admitted to practice automatically if they represent the federal government while Ditton who has passed (and who was an Army JAG) is absolutely denied admission.

Further, denying admission to Ditton to represent clients against the federal government when their attorneys are automatically admitted regardless of state bar membership or state bar examination is irrational when federal government contracts, constitutional, administrative, and bankruptcy law are not tested by the Montana bar examination differently than any other state's bar examination. All those subjects, if tested, are done so uniformly on a national basis by the multi-state bar examination that Ditton passed in Virginia, in February 1982 during law school. There is no higher standard or minimal level of competence achieved by passing the Montana state bar examination. *See Supreme Court of Virginia v. Friedman,* 487 U.S. 59, 64-70 (1988) (rejecting

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[30]The justification then given as a rational basis for the "diploma privilege" was state court judges' familiarity with the state law school. See *Goetz v. Harrison,* 154 Mont. 274, 280-281, 462 P.2d 891 (1969) (denying Yale law school graduate admission); *Huffman v. Montana Supreme Court*, 372 F. Supp. 1175 (1974) (denying U. of Chicago law school graduate admission). That rationale was discarded in *Matter of Bar Examination,* 187 Mont. At 162 ("The wrong people are making threshold decisions that have the effect of transferring control of the admission of lawyers to the Bar away from the court of last resort, …").

argument that alternate route to gain admission by passing bar examination precluded discrimination violating the Privileges and Immunities Clause). Passing the Montana bar examination does not rationally relate to higher competence or ethical knowledge. Ditton passed the Multi-state Professional Responsibility examination at the University of Montana law school in August 2000. R.59. He is already subject to the rules of professional conduct for Virginia and the District of Columbia, and would be subject to ABA's model rules of professional conduct incorporated in the local disciplinary rules.

"[W]hen a state licensing law excludes a lawyer from practice that federal rules expressly allow, the two rules do conflict, and the state law must give way." *Sperry v. Florida,* 373 U.S. 379, 383-385 (1963) (no state power of review over federal admission). States cannot impose licensing requirements on federal government contracts. *Leslie Miller, Inc., v. Arkansas,* 352 U.S. 187 (1956) (cited in *Sperry, supra,* 373 U.S. at 403). Attorneys practicing federal government contracts law are not required to be members of state bars where they reside or have an office. *See* COFC Rule 81(b); ASBCA Rule 26; GAO, 4 C.F.R. § 21. Petitioner was denied admission *pro hac vice* after associating himself with local counsel. Local counsel are not required of federal nonresident attorneys.

L.R. 83.3 is also unconstitutional on its face and as applied to Ditton because the rule preempts the practice of federal law by an out-of-state licensed and examined attorney by requiring an irrelevant resident state bar examination in violation of the Supremacy Clause, Art. VI. Passing the Montana bar examination is dispositive and controlling. "Mr. Ditton has not taken and passed the Montana bar examination.", "a simple remedy". R.45. Respondent District Court also stressed "Montana federal courts" as if the state has a controlling influence over federal admission. However, "[a]dmission to practice law before a state's courts and admission to practice before the federal courts in that state are separate, independent privileges." *Theard v. United States*, 354 U.S. 278, 281 (1957); *Brown v. Smith,*

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[31]*See In re Ruffalo,* 390 U.S. 544, 547 (1968) (admission to a state bar); *Rittenhouse v. Delta Improvement, Inc.*, 291 F.3d 925, 930 (6th Cir. 2002) ("a valid state source of the authority to practice law: he is properly licensed by Texas."); *Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989).

222 F.3d 618 (9th Cir. 2000).[31] By acknowledging Petitioner Ditton's "genuineness" while stating he *must* be a Montana bar member and take and pass the Montana bar examination Respondent District Court also improperly applied the local admission rules mechanistically.[32] Petitioners present a clear basis in fact and law this court should declare the local admission rules unconstitutional and under the right and justice standard order him admitted.

DATED: January 29, 2004 Respectfully submitted,

CHARLES R. ARMENT and
RESEARCH AIR, INC. by

Michael H. Ditton
Attorney at Law
2210 Bridger Drive
Bozeman, Montana 59715
(406) 587-7386 (voice/fax)

_____
/s/ Michael H. Ditton, VSB No. 21915
Attorney for Petitioners, and
Petitioner on Part IVC supra.

PETITIONERS' CORPORATE DISCLOSURE STATEMENT

Petitioner Research Air, Inc. pursuant to Federal Rules of Appellate Procedure Rule 26.1 and Ninth Circuit Rule 21-3 hereby discloses that there is no parent corporation and that it is not a publicly held corporation that owns 10% or more of its stock.

RESEARCH AIR, INC.
by

_____
/s/ Michael H. Ditton

[32] *United States v. Ries*, 100 F.3d 1469, 1472 (9th Cir. 1996) ([M]echanistic application of rules limiting such appearances is improper."); *In Re Evans*, 524 F.2d 1004, 1007 (5th Cir. 1975) ("Admission to a state bar creates a presumption of good moral character that cannot be overcome merely by the whims of...Court.").

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2004 I served a copy of the foregoing Petition for Writs of Mandamus and Prohibition by placing a copy in U.S. mail, postage prepaid, addressed to the following:

Honorable Richard F. Cebull
United States District Court Judge
United States District Court for the District of Montana
James F. Battin United States Courthouse
316 North 26th Street
Billings, Montana 59101
Respondent District Court

George F. Darragh, Jr.
Assistant United States Attorney
U.S. Attorney's Office
P.O. Box 3447
Great Falls, Montana 59403
Counsel for Respondents/Defendants

/s/ Michael H. Ditton

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

RESEARCH AIR, INC. AND CHARLES R. ARMENT,

Plaintiffs,

v.

GALE NORTON, ET AL.,

Defendants,

GALE NORTON, Secretary of the Interior, et al.,

Real Parties in Interest.

CV-03-54-BU-RFC

ORDER

[Filed January 7, 2004]

On November 20, 2003, attorneys Francis McGee and Patrick McGee filed a Motion to Withdraw as Counsel for Plaintiffs. Upon consideration thereof,

IT IS HEREBY ORDERED that a hearing on said Motion is set for **Friday, January 30, 2004, at 2:00 p.m.** in Courtroom I of the James F. Battin Federal Building, Billings, Montana, before Judge Richard F. Cebull.

The Clerk of Court is directed to notify all parties of the making of this Order.

DATED this 7th Day of January, 2004.

RICHARD F. CEBULL
U.S. DISTRICT JUDGE

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

RESEARCH AIR, INC. AND CHARLES R. ARMENT,
Plaintiffs,

v.

GALE NORTON, ET AL.,
Defendants.

CV-03-54-BU-RFC

ORDER

[Filed October 15, 2003]

On July 2, 2003, Michael Ditton filed an Application for Admission Pro Hac Vice. Mr. Ditton's application was denied pursuant to Montana Local Rule 83.3(e)(2) which prohibits an attorney from practicing under the *pro hac vice* provision if the attorney resides in Montana. According to his application, Mr. Ditton currently lives in Bozeman, Montana. Recently, on September 29, 2003, Mr. Ditton filed a Petition for Admission by Waiver. Now it appears Mr. Ditton wishes to circumvent the local rule and has requested the Court admit him to practice law in Montana through waiver.

Mr. Ditton submits to the Court he is an attorney in good standing, and the Court has no reason to question his genuineness. However, the Court is not inclined to waive a local rule and doubts its authority to do so. If Mr. Ditton believes the Court in anyway implied otherwise at the hearing on July 24, 2003, he is mistaken. The fact is Mr. Ditton resides in Montana so he cannot be admitted under the *pro hac vice* provision under Local Rule 83.3(e). In addition, Mr. Ditton has not taken and passed the Montana bar examination.

Therefore, he cannot be admitted into this Court as a member of the State Bar of Montana.

Mr. Ditton's arguments for waiver are unpersuasive. The single Ninth Circuit case he utilizes to support waiver is easily distinguished from the facts at hand. In *Poole v. Smith*, the definition of "attorney" as used in the Bankruptcy Code was in dispute. 222 F.3d 618 (9th Cir. 2000). Smith was a member of the Illinois State Bar and was later admitted by the United States District Court for the District of Arizona to practice in the Arizona federal courts. *Id.* at 620. Smith was not a member of the Arizona State Bar. Id. Smith was handling Poole's bankruptcy, and the trustee objected to compensating Smith because he argued Smith was not an "attorney" for compensation purposes under 11 U.S.C. § 101(4) because Smith was not an Arizona bar member. *Id.* at 621.

The trustee argued the "applicable law" referenced in § 101(4) meant the practice rules promulgated by the Arizona Supreme Court. *Id.* at 621. Thus, Smith would not qualify as an "attorney" under the Bankruptcy Code because Arizona Supreme Court's admission rules governed the practice in United States Bankruptcy Courts, and Smith was not licensed by the State of Arizona. *Pool*, 222 F.3d at 622. The Ninth Circuit disagreed, noting "Smith was duly admitted to practice in the District of Arizona as a non-resident lawyer pursuant to Ariz. R. of Practice-1.5(c)." *Id.* The Ninth Circuit ruled long-standing precedent makes clear that practice before federal courts is not governed by state court rules. *Id.* According to the Ninth Circuit, "[t]he trustee cannot employ a collateral attack based on state law to prevent Smith from practicing federal bankruptcy law in Arizona." *Id.* at 623.

Mr. Ditton does not have much in common with Smith. Though Smith was not licensed to practice law in the State of Arizona, he *was* admitted to practice in the Arizona federal courts. Therefore, he was justifiably compensated for practicing federal bankruptcy law in Arizona. On the other hand, Mr. Ditton is not admitted to practice law in the State of Montana, nor in Montana's federal courts. An attorney who resides in Montana *must* be a member of the State Bar in order to practice in its federal courts. This is a simple rule. While Mr. Ditton's argument pertaining to the inequality of Local Rule 83.3's residency requirements of United States Attorneys and

non-United States Attorneys is interesting, it will not be addressed here. A simple remedy is available to Mr. Ditton that would permit him to practice law in the State of Montana, and, thus, in Montana's federal courts—obtain a license to do so by successfully passing the Montana bar examination.

IT IS HEREBY ORDERED Mr. Ditton's Petition for Admission by Waiver is **DENIED**.

The Clerk of Court is directed to notify the parties of the making of this Order.

Dated the 15th day of October, 2003.

Richard F. Cebull
United States District Judge

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

Civil Action No. 03-54-BU-RFC

RESEARCH AIR, INC. AND CHARLES R. ARMENT,
Plaintiffs,

v.

GALE NORTON, ET AL.,
Defendants.

ORDER

[Filed July 25, 2003]

Pursuant to court proceedings held on July 24, 2003,

IT IS HEREBY ORDERED:

1. The United States shall provide Plaintiffs with the administrative record pertaining to this cause of action;

2. Plaintiffs shall have 30 days from the date they receive the record to file a response to the brief submitted by the United States; and

3. The United States will then have 10 days to respond to any new issues brought up by Plaintiffs.

Upon the filing of all briefs on the preliminary injunction issue, the Court shall determine whether a subsequent hearing is necessary, and if so, will notify the parties at that time.

The Clerk of Court is directed to notify the parties of the making of this Order.

Dated the 25th day of July, 2003.

Richard F. Cebull
UNITED STATES DISTRICT JUDGE

APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, BUTTE DIVISION

CIVIL ACTION NO. 03-54-BU-RFC

RESEARCH AIR, INC., AND CHARLES R. ARMENT, 225 Coulee Drive, Bozeman, Montana 59718

Plaintiffs,

v.

HONORABLE GALE A. NORTON, Secretary of United States Department of the Interior, 1849 C St., N.W., Washington, D.C. 20240,

STEVE R. SMITH, Director, West Area, Office of Aircraft Services, Department of the Interior, 2741 Airport Way, Boise, Idaho 83705,

ROBERT GALLOWAY, Aviation Safety Manager, Office of Aircraft Services, Department of the Interior, 2741 Airport Way, Boise, Idaho 83705

DEPARTMENT OF THE INTERIOR, 1849 C St., N.W., Washington, DC 20240

AND

UNITED STATES OF AMERICA,

Defendants.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
[Filed July 3, 2003]

Plaintiffs Research Air, Inc. and Charles R. Arment, through their undersigned counsel, pursuant to the Federal Rules of Civil Procedure Rule 65(a), hereby move the Court for entry of an order preliminarily restraining and enjoining Defendants from continuing an indefinite suspension and *de facto* debarment of Plaintiffs from government contracting and retaining a Department of Interior Office of Aircraft Services ("OAS") interagency pilot identification

card ("OAS pilot card") previously issued to Plaintiff Arment pending trial and final judgment.

The grounds for this motion are that Plaintiffs suffer deprivation of constitutional rights and reputational, economic and physical injuries that are immediate, definite and irreparable. Plaintiffs probable success on the merits is high. Plaintiffs raise serious questions and the balance of hardships tips in their favor. Points and authorities and argument are provided in a forthcoming Brief filed pursuant to L.R. 7.1.

WHEREFORE, Plaintiffs request that the Court grant this motion and preliminarily enjoin Defendants from continuing the indefinite suspension of Plaintiffs and *de facto* debarment from government contracting, compel Defendants to return the OAS pilot card to Mr. Arment and reinstate Plaintiffs' names on Interior's procurement vendor lists, pending trial in these proceedings.

Dated: July 2, 2003 Respectfully submitted,

/s/ Michael H. Ditton
Attorney at Law
2210 Bridger Drive
Bozeman, Montana 59715
VSB No. 21913
D.C. Bar No. 434646
Attorneys for Research Air, Inc.
and Charles R. Arment

Dated: July 2, 2003

/s/ Patrick D. McGee
120 West Granite Street
Butte, MT 59701

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2003 I served a copy of the foregoing Plaintiffs' Motion For Preliminary Injunction by placing a copy in U.S. mail postage prepaid addressed to the following:

Honorable Gale A. Norton, Secretary
United States Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Honorable John Ashcroft, Attorney General
United States of America
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

William Mercer
United States Attorney for the District of Montana
181 Federal Building
400 North Main
Butte, Montana 59701

Steve R. Smith, West Area Director
Office of Aircraft Services
National Business Center
United States Department of the Interior
2741 Airport Way
Boise, Idaho 83705

Robert Galloway, Aviation Safety Manager
Office of Aircraft Services
National Business Center
United States Department of the Interior
2741 Airport Way
Boise, Idaho 83705

/s/ Michael H. Ditton

APPENDIX O

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

Civil Action No. 03-54-BU-RFC

RESEARCH AIR, INC. AND CHARLES R. ARMENT, 225 Coulee Drive, Bozeman, Montana 59718

Plaintiffs,

v.

HONORABLE GALE A. NORTON, Secretary of United States Department of the Interior, 1849 C. St., N.W., Washington, D.C. 20240,

STEVE R. SMITH, Director, West Area, Office of Aircraft Services, Department of the Interior, 2741 Airport Way, Boise, Idaho 83705,

ROBERT GALLOWAY, Aviation Safety Manager, Office of Aircraft Services, Department of the Interior, 2741 Airport Way, Boise, Idaho 83705

DEPARTMENT OF THE INTERIOR, 1849 C St., N.W., Washington, DC 20240

and,

UNITED STATES OF AMERICA,

Defendants.

COMPLAINT FOR DAMAGES, INJUNCTIVE, AND DECLARATORY RELIEF

[Filed July 3, 2003]

PRELIMINARY STATEMENT

1. Defendant Department of the Interior hired Research Air, Inc. and Mr. Arment to track fish in the Green River in Colorado and Utah during winter weather with Plaintiff Arment piloting an airplane using his unique piloting skills and his aircraft equipped with sophisticated radio frequency detection and global positioning system equipment. The Department never told Plaintiffs they would be indefinitely suspended if Mr. Arment safely flew under a power line

to find the fish underneath frozen ice. Although Mr. Arment, a well-respected pilot, always accomplished the Department's missions and has received rave reviews for himself and his aircraft, OAS imposed an indefinite suspension upon Mr. Arment and Research Air, Inc. before fully investigating the alleged incident, taking his OAS interagency pilot qualification card from him in March 2002. Defendants have blacklisted Plaintiffs from government contracting and branded Plaintiff Arment an unsafe pilot without due process of law and in violation of the Administrative Procedure Act.

PARTIES

2. Plaintiff Charles R. Arment resides in Gallatin County, Montana.

3. Plaintiff Research Air, Inc. is incorporated under the laws of Montana and has its principal place of business located in Gallatin County, Montana.

4. Defendant Norton is the Secretary of the Department of Interior located in Washington, D.C. and is sued in her official capacity.

5. Defendant Smith is the West Area Director of the Office of Aircraft Services, Department of Interior, located in Boise, Idaho and is sued in his official and individual capacities.

6. Defendant Galloway is the Aviation Safety Manager, West Area Office of Aircraft Services, Department of the Interior, located in Boise, Idaho and is sued in his official and individual capacities.

7. Defendant United States imposed the indefinite suspension and *de facto* debarment of Plaintiffs through Defendant Department of the Interior headquartered in Washington, D.C..

JURISDICTION AND VENUE

8. This Court has jurisdiction of this action under 28 U.S.C. §§ 1331, 1346, 1361, 1491(a)(1), and 2201, and Section 10(c), Administrative Procedure Act, 5 U.S.C. § 704. Venue in this case is based on 28 U.S.C. § 1391(e).

9. This action arises under the Due Process Clause and the Takings Clause of the Fifth Amendment of the *United States Constitution*, the Administrative Procedure Act ("APA"), as amended, 5

U.S.C. §§ 551 *et seq.* and §§ 701 *et seq.*, and the Federal Aviation Act, 49 U.S.C. § 40103, *et seq.*.

FACTUAL AVEREMENTS

10. Mr. Arment is a highly skilled pilot with unique experience who has a business of flying low-level wildlife and waterfowl tracking missions for the Department of the Interior's Fish and Wildlife Service and for other federal agencies. Plaintiffs are parties within the meaning of 5 U.S.C. § 551(3).

11. Plaintiff Arment is the president of Research Air, Inc. and owns a Christen Husky two-seat airplane equipped with sophisticated radio frequency detection and global positioning system equipment he purchased to enhance and make more competitive his status as a government contractor flying missions as a contract pilot for federal agencies. Mr. Arment has invested heavily in his aircraft and flying skills to make himself competitive. Mr. Arment is fully certified and licensed by the Federal Aviation Administration ("FAA").

12. Defendant Interior's Office of Aircraft Services ("OAS") has deemed Mr. Arment fully qualified to fly low-level special use activities flights for Defendants since 1982. OAS issued to Plaintiff Arment an OAS pilot interagency qualification card ("OAS pilot card") in 1982. The OAS pilot card is a license within the meaning of 5 U.S.C. § 551(8).

13. OAS trained Plaintiff Arment for 10 years while he was employed by Defendant Interior to fly low-level special use activities in Alaska. Defendant OAS represented to Plaintiffs that Defendants held a valid exemption in 1991 waiving FAA Federal Aviation Regulation 14 CFR § 91.119(c) prohibiting flying within 500 feet of a structure. Plaintiffs relied to their detriment upon Defendants having a valid exemption from the FAA waiving compliance with surface altitude height and obstacle restrictions.

14. OAS's flight operation rules specifically excepts from applicability FAA Federal Aviation Regulation 14 CFR § 135.203 that prohibits visual flying lower than 500 feet vertically from the ground and closer than 500 feet horizontally from an obstacle. Aircraft Rental Agreement Supplement No. 6 ¶ B.8.6.1.1 ("Special Use

- Low Level Activities"). (Exhibit "Ex." 1, attached hereto). This statement by Defendants constitutes a representation that flying closer than 500 feet to the surface and within 500 feet of an obstacle is lawful and safe flying. OAS's flight operation rules also state that "Bureau projects often dictate that flights be conducted in close proximity to the ground where wires are prevalent." This statement by Defendants constitutes a representation that flying closer than 500 feet to an obstacle is lawful and safe flying.

A. *Defendants' Administrative Procedure*

15. Defendant Department of Interior is an agency within the meaning of 5 U.S.C. 551(1). Defendant Interior's subordinate office OAS coordinates and directs all fleet and contract aircraft for the Secretary of the Department of the Interior and assumes responsibility for policy oversight and aviation services. The Department's bureaus, offices and services are responsible for implementing safety requirements, deciding on whether to use fleet or contract aircraft, and the scheduling and use of their aircraft.

16. Defendant Interior's rules state that, "[a]ll commercial aviation services required by any bureau or office of the Department of the Interior…shall be acquired through the procurement process of the Department's Office of Aircraft Services (OAS)." OAS ordering procedures specify that contract flight services may only be procured from vendors approved under an Aircraft Rental Agreement ("ARA") either through the appropriate OAS Flight Coordination Center or directly with an approved vendor. OAS procedures state that an ordering official shall ensure that the vendor and aircraft being considered are on the OAS Source List, including the electronic Source List on the OAS Internet website home page. An ARA is a basic ordering agreement with contracts made upon award of orders under the ARA. (Ex. 1).

17. OAS contracting is subject to federal procurement statues and acquisition regulations. An OAS Contracting Officer ("CO") is "the appointed Government official with authority to enter into, administer and terminate" the ARA. ARA ¶ C 4.1. ARA provision ¶ C 4.1.3 states that "*No one but the CO* is authorized under any circumstances to: …Make a final decision on any agreement mater that is subject to the Disputes clause of this agreement…[and] terminate,

for any cause, the Vendor's right to proceed." ARA ¶¶ C 4.1.3 and C 4.1.4 (emphasis in original).

18. Plaintiffs' most recent ARA, 80-ARA-6366, was issued November 13, 2001 effective January 1, 2002, by OAS Contracting Officer Vicki Johnston. According to the ARA:

> Upon involvement in an Incident with Potential as defined under Mishaps, a pilot performing under this agreement **may** be suspended from performing pilot duties under this agreement and any other activity authorized under the interagency pilot qualification card(s) issued to the pilot pending the incident investigation outcome.

ARA ¶ C 1.7.3 (emphasis in original). The ARA further provides:

> C 1.7.4 When the pilot is suspended, and when requested, the interagency pilot qualification card(s) will be surrendered to the COTR or other authorized agency representative. Pilot suspension will continue until:
>
> C 1.7.4.1 The investigation findings and decision indicate no further suspension is required and the interagency pilot qualification card(s) is returned to the pilot; or
>
> C 2.7.4.2. Revocation action to cancel the pilot's interagency DOI pilot authorizations is taken by the issuing agency in accordance with agency procedures.

19. "Aviation hazard" is defined in the ARA as "[a]ny condition, act, or set of circumstances that exposes an individual to unnecessary risk or harm during aviation operations." ARA ¶ C.10.1.3. OAS's "aviation hazard" definition is materially different from OAS's "incident with potential" definition. ARA ¶ C 10.1.6 defines "incident-with-potential" as:

> An incident that narrowly misses being an accident and in which the circumstances indicate significant potential for substantial damage or serious injury. Classification of an incident as an "incident with Potential" is determined by the OAS Aviation Safety Manager (ASM) for DOI users or

U.S. Forest Service (USFS) Aviation Safety Manager for USFS users.

20. Defendant Department of Interior's Departmental Manuals constitute legislative rulemaking, but were not published in the *Federal Register* and were not promulgated through notice and comment rulemaking as required by 5 U.S.C. § 553. OAS's Operational Procedural Memoranda constitute legislative rulemaking, but were not published in the *Federal Register* and were not promulgated through notice and comment rulemaking as required by 5 U.S.C. § 553. Defendants' ARA suspension procedures constitute legislative rulemaking but were not published in the Federal Register and were not promulgated through notice and comment rulemaking as required by 5 U.S.C. § 553. Defendants' suspension procedures constitute an adjudication within the meaning of 5 U.S.C. § 551(7).

21. The Federal Acquisition Regulations ("FAR") require that a Contracting Officer exercise discretion before determining a contractor responsible or nonresponsible. FAR Subpart 9.1 ("Responsible Prospective Contractors"). The FAR also requires that determinations of nonresponsibility by a Contracting Officer must be referred to the Small Business Administration ("SBA") so the SBA can determine whether to issue a certificate of competency. FAR Subpart 19.6 ("Certificates of Competency and Determinations of Eligibility").

22. The Federal Acquisition Regulations also require that a duly authorized suspension or debarment official exercise discretion before suspending or debarring a government contractor. FAR Subpart 9.4. The suspension or debarment official must consider mitigating factors. Suspension or debarment must not be imposed for punishment.

23. The Administrative Procedure Act requires that in any adjudication required to be made on the record the decisionmaker must be neutral and detached. 5 U.S.C. § 556. The Administrative Procedure Act requires that before any license may be denied notice and a hearing must be provided. 5 U.S.C. § 554.

24. Defendant Smith is not a Contracting Officer within the meaning of the Contract Disputes Act of 1978 or the Federal Acquisition Regulations ("FAR"). Defendant Smith is not a suspension or

debarring official within the meaning of FAR Subpart 9.4. Defendant Smith is not a neutral and detached decisionmaker or adjudicator within the meaning of 5 U.S.C. § 556.

25. Defendant Galloway is not a Contracting Officer within the meaning of the Contract Disputes Act of 1978 or the Federal Acquisition Regulations ("FAR"). Defendant Galloway is not a suspension or debarring official within the meaning of FAR Subpart 9.4. Defendant Galloway is not a neutral and detached decisionmaker or adjudicator within the meaning of 5 U.S.C. § 556.

26. The OAS Contracting Officer has not exercise her discretion to determine Plaintiffs nonresponsible. The OAS contracting Officer has not referred any nonresponsibility determination to the SBA for a certificate of competency. The Defendants duly authorized suspension and debarment official has not exercised his or her discretion to determine whether the alleged misconduct by Plaintiffs is cause for suspension or debarment, whether suspension or debarment is necessary to protect the public interest, and whether mitigating factors preclude any suspension or debarment of Plaintiffs.

B. *Defendants' Suspension of Plaintiffs*

27. By letter dated March 27, 2002 OAS Aviation Safety Manager Galloway demanded that Mr. Arment return to OAS his OAS pilot interagency qualification card (hereinafter "OAS pilot card"). (Ex. 2). Defendant Galloway's March 27, 2002 letter is an order within the meaning of 5 U.S.C. § 551(6). Defendant Galloway's May 6, 2003 letter is a sanction within the meaning of 5 U.S.C. § 551(10). Defendant Galloway took Plaintiff Arment's OAS pilot card without completing any investigation into whether Mr. Arment violated any pilot or aircraft flight regulation. He did so providing Mr. Arment notice only that OAS was investigating an alleged violation of two ARA provisions: ARA ¶ C.10.1.3 ("Aviation Hazard") and ARA ¶ C 10.1.6 ("Incident-with-Potential"). He did so without providing Mr. Arment an OAS flight check. He also did so without providing Mr. Arment any meaningful opportunity to be heard.

28. Defendant Galloway stated that he was investigating a serious aviation hazard as an incident with potential citing only the ARA suspension provisions as authority for his action. The alleged incident occurred on December 13, 2001 while Mr. Arment was flying a

low-level special use operation for the Defendant Interior's Fish and Wildlife Service ("FWS") Colorado River Fish Project in Utah and Colorado. Defendant Interior had hired Plaintiffs to locate fish using radio frequencies detecting signals from transmitters embedded in the fish in a river covered with frozen ice.

29. Neither Mr. Arment nor the assigned FWS biologist passenger thought what happened on December 13, 2001 was any kind of aircraft incident. OAS did not begin their review of the December 13, 2001 flight until March 2002.

30. Defendant Galloway's suspension order deprived Plaintiffs of any opportunity to complete their contracts with federal agencies. Defendant Galloway's suspension order deprived Plaintiffs of any opportunity to obtain future federal agency government contracts. Defendant Galloway's suspension order prevented Plaintiffs from proceeding under the ARA.

31. By letter dated May 6, 2003 Defendant Smith ratified and continued Defendant Galloway's indefinite suspension of Plaintiff Arment's OAS pilot card. (Ex. 3). Defendant Smith stated to Mr. Arment that he had "completed his review of the Incident-with-Potential that occurred during a flight you conducted on December 13, 2001 for the U.S. Fish and Wildlife Service." He stated his determination to impose sanctions is based on:

> 1. You willing operated the aircraft at an altitude that resulted in the situation where you were forced to evade power lines and this altitude was not uncommon to the standard profile you had used on previous similar missions. ...
>
> 2. You intentionally flew under a set of power lines that are estimated to range between 60 and 165 feet above the terrain. In doing so you actually came in contact and made tracks on the frozen river below the wires. ...
>
> 3. You attempted to minimize and downplay this event and in fact, based on interviews, told the passenger and the dispatcher that the event was not an "incident."

(Ex. 3 at 1-2). Defendant Smith's May 6, 2003 letter is an order within the meaning of 5 U.S.C. § 551(6). Defendant Smith's May 6, 2003 letter is a sanction within the meaning of 5 U.S.C. § 551(10).

32. Defendant Smith's May 6, 2003 sanctions order relies upon transcripts of government employees and other information furnished by OAS not disclosed to Plaintiffs or further identified. Defendant Smith failed to provide Plaintiffs a copy of the one administrative decision he cited, *Administrator v. Scollan*, 2 NTSB 538 (1973). (Ex. 4). Defendant Smith failed to provide Plaintiffs any kind of hearing. According to Defendant Smith, Plaintiffs' only recourse is to ask Defendant Smith to reconsider his decision. He refuses to reconsider unless "additional substantive evidence is presented" by Plaintiffs. (Ex. 3 at 3). Defendant Smith, however, refuses to provide Plaintiffs any of the witness statements, any of the investigative report, or the administrative record upon which his determination is based. Defendants have taken the position that Plaintiffs must pay through the Freedom of Information Act for a copy of the administrative record. Defendants have estimated fees of $810 that Plaintiff must agree to pay before the un-described and un-categorized documents are furnished to Plaintiffs. (Ex. 5).

33. Defendants Galloway and Smith imposed sanctions against Plaintiffs without following their own safety rules. OAS's rules provide that:

> Flight Checks—Post Aircraft Accident or Incident with Potential.
>
> Pilots shall take a flight check following an aircraft accident or incident with potential. This requirement can only be waived by the OAS Director. An OAS pilot inspector shall administer the flight check.

Department of Interior Departmental Manual 351 DM ¶ 3.1E. Plaintiff Arment had passed an OAS routine flight check on June 11, 2001 given by an OAS inspector pilot. Plaintiff Arment passed the FAA Part 135 commercial pilot flight check on March 2, 2002 given by an FAA inspector pilot.

34. In imposing sanctions, Defendant Smith announced to Plaintiffs that:

As a minimum, education and training are required to try and correct these deficiencies. Prior to consideration of any reapplication to fly for the Department of the Interior (DOI) you will be required to provide this office with written verification showing successful completion of formal structure courses in the following subject matter:

Review of Code of Federal Regulations Parts 91 and 135. Accident prevention with emphasis in human factors and cockpit resource management.

Risk analysis and management.

Education that promotes an understanding of human behavior and interpersonal relationships with emphasis on the appropriate use of, and response to, authority.

All instruction should be from credible sources such as the FAA, Aircraft Owners and Pilots Association (AOPA), aeronautical training centers or universities, or a provider of specialty aviation related courses.

In addition, as validation of long-term positive impacts of this education and training and prior to consideration of any future carding by the OAS, you will be required to perform a minimum of 200 hours of incident and accident free flying over a period of at last 12 months. This flying shall be of the type performed in support of DOI special use missions. It is requested that a log of this activity, to include date, customer, and contact information be maintained as validation of such flying. After completing these requirements you may request a post Incident-with-Potential flight evaluation. If successful, you will be issued a letter stating your eligibility for consideration as an OAS approved pilot if an award is made to your company in the future.

(Ex. 3 at 2-3).

35. Defendant Smith's determination not to have Mr. Arment take a flight check following the alleged Incident-with-Potential, but to have Mr. Arment fly a "post Incident-with-Potential flight evaluation" more than two years after the alleged incident, only after receiving prescribed classroom instruction and completing a

one year 200 flying hours requirement impose conditions irrelevant to the agency's safety rules.

36. Defendant Smith's ordered sanctions for Mr. Arment impose conditions for regaining his OAS card that are practically impossible. Mr. Arment cannot fly low-level special use type missions for 200 flight hours without having any appreciable income from federal government contracting.

37. The maneuvers Plaintiff Arment performed as a pilot on December 13, 2001 were maneuvers he used successfully and safely as an OAS pilot and Department of Interior employee in Alaska in 1982 - 1992. Mr. Arment relied to his detriment upon Defendants' representations in Alaska that the maneuvers he performed were lawful and constituted safe flying.

38. Defendants published the suspension of Plaintiffs from OAS interagency flight contracting by excluding Plaintiffs from OAS's vendor pilot and vendor aircraft lists on OAS's official website accessible to all using the Internet.

39. Immediate suspension of Mr. Arment's OAS pilot card was not necessary to protect the public interest. Defendants made no finding or determination that immediate action was necessary to protect the public interest. Defendants imposed the indefinite suspension and *de facto* debarment of Mr. Arment as punishment. Defendants did not impose the indefinite suspension and *de facto* debarment of Mr. Arment as in the public interest and for the protection of the federal government.

40. Defendants have no statutory authority for imposing the OAS interagency pilot qualification card requirement on Plaintiffs. Defendants have no statutory authority for sanctioning Plaintiffs for violations of OAS rules. Defendants indefinite suspension and *de facto* debarment of Plaintiffs is *ultra vires*.

41. Defendant Smith's May 6, 2003 constitutes final agency action. Defendants have reached a definitive position on an issue that causes actual and concrete injury to Plaintiffs. Defendant Department of Interior does not provide any appeal remedy. Defendants do not render inoperative the indefinite suspension of Plaintiff Arment's OAS pilot card and other sanctions imposed against him

pending any kind of inter-agency appeal. Defendants do not render inoperative the indefinite suspension and *de facto* debarment of Plaintiffs from government contracting pending any kind of inter-agency appeal.

C. *The Federal Aviation Act*

42. The Federal Aviation Administration is the sole federal agency authorized to make public interest determinations and whether sanctions protect the Government in aircraft operations. Congress intended that the FAA regulate navigable airspace. 49 U.S.C. § 40103(b). Congress expressly gave the FAA broad authority to grant exemptions from safety regulations, including minimum safe altitudes, "when the Administrator decides the exemption is in the public interest." 49 U.S.C. § 40109(b). Congress specifically intended and expressed that the federal Courts of Appeals have exclusive jurisdiction over final FAA orders related to airplane commerce and safety. 49 U.S.C. § 46110(a). By imposing the OAS card requirement and initiating and imposing an indefinite suspension and *de facto* debarment of Plaintiffs, Defendants have defied Congress and deprived Plaintiffs of the authorized judicial review.

43. The Federal Aviation Regulations do not define "aviation hazards" as OAS does. The Federal Aviation Regulations explicitly recognize overhead transmission and utility lines "may not be readily visible and the wire may be virtually impossible to see under certain conditions." FAA Aeronautical Information Manual ("AIM") § 7-5-3c. AIM § 7-5-3a states:

> While 14 CFR 91.119 allows flight below 500 AGL when over sparsely populated areas or open water, such operations are very dangerous. At and below 200 feet AGL there are numerous power lines, antenna towers, etc., that are not marked and lighted as obstructions and; therefore, may not be seen in time to avoid a collision.

The Federal Aviation Regulations do not define or discuss "incident-with-potential." The conduct OAS regards as an "aviation hazard" and "incident-with-potential" is not conduct the FAA even requires reporting much less investigation. *See* 14 CFR Part 803 & FAA AIM Section 6. OAS did not report the alleged December 13, 2001 incident by Plaintiffs to the FAA.

44. The FAA does not define "Incident-with-Potential" or require reporting of an "Incident-with-Potential." The FAA defines accident as:

> ...an occurrence associated with the operation of an aircraft which takes place between the time ay person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage.
>
> * * *
>
> Substantial damage means damage or failure which adversely affects the structural strength, performance, or flight characteristics of the aircraft, and which would normally required major repair or replacement of the affected component. Engine failure or damage limited to an engine if only one engine fails or is damages, bent fairings or cowling, dented skin, small punctured holes in the skin or fabric, ground damage to rotor or propeller blades, and damage to landing gear, wheels, tires, flaps, engine accessories, brakes or wingtips are not considered "substantial damage' for the purpose of this part.

14 CFR § 830.2.

45. Under the FAA Federal Aviation Regulations, the pilot-in-command has the sole authority to determine airplane airworthiness, safe operations, and whether to declare an emergency while flying. The FAA Federal Aviation Regulations specify that the pilot-in-command has direct responsibility and final authority for an in-flight emergency requiring immediate action and if he deviates from any rule to the extent required to meet that emergency shall upon the request of the FAA Administrator, send a written report of that deviation to the Administrator. 14 CFR § 91.3.

46. Defendants knew that the conduct for which OAS ordered sanctions against Plaintiffs is not conduct sanctionable by the FAA. The 35 day ordered suspension in *Administrator v. Scollan*, 2 NTSB 538 (1973) involved a pilot striking a utility wire and carelessly piloted his aircraft in such a manner that the utility wires could

not be detected in sufficient time to avoid striking them. (Ex. 4). Plaintiff Arment as pilot-in-command safely avoided contacting any utility wire.

47. The FAA Administrator's authority to suspend or revoke pilot and aircraft certificates may be exercised only by FAA's "Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for the region or the Aeronautical Center." 14 C.F.R. § 13.19(b).

48. Defendants' inference that Plaintiff Arment is an unsafe pilot because he flew underneath and within 500 feet of a utility line is unreasonable when Defendant Interior hired Mr. Arment to fly low level special use operations chasing fish in a river covered with frozen ice.

49. OAS believes it has the authority to impose a pilot licensing requirement over and above the FAA certificate issued to all approved pilots. OAS believes that it has the authority to suspend an OAS pilot card without providing any of the rights provided by FAA in suspending or revoking an FAA pilot's certificate. OAS believes OAS may suspend or revoke an OAS pilot card even if there is no proven violations of FAA aviation regulations. OAS believes OAS may suspend or revoke an OAS pilot card not because the OAS pilot is not qualified to fly low level operations for DOI, but because the OAS pilot did not in the cockpit while flying apply risk analysis and management and demonstrate obedience to authority.

50. OAS expects OAS contract pilots to disregard their experience and qualifications, their instincts and judgment, all gained while flying low level special use operations for the Department of Interior, and while in the cockpit flying apply "understanding[s] of human behavior and interpersonal relationships with emphasis on the appropriate use of, and response to, authority".

51. Plaintiff Arment is presently entitled to exercise ownership dominion over the OAS pilot card Defendants issued to him as personal property. Plaintiff also has a property interest in pursuing a gainful occupation as an OAS contract pilot. Plaintiffs have a liberty interest in remaining free from the stigma of being labeled unsafe or incompetent. Plaintiffs have property interests in performing, completing, and remaining eligible for government contract awards.

COUNT I

Violation of the Fifth Amendment of the United States Constitution—Denial of Substantive Due Process

52. Plaintiffs herby incorporate the allegations of paragraphs 1 through 51 as if fully set forth herein.

53. The Fifth Amendment to the *United States Constitution* guarantees to Plaintiffs substantive due process of law when federal agency adverse action deprives Plaintiffs of life, liberty or property.

54. Defendants' indefinite suspension of Plaintiff Arment's OAS pilot card for conduct not a violation of the FAA Federal Aviation Regulation is not rationally connected with Plaintiff Arment's fitness or capacity as a pilot. Defendants' indefinite suspension of Plaintiff Arment's OAS pilot card for low level flying specifically required by Defendants' contract with Plaintiffs is not rationally connected with Plaintiff Arment's fitness or capacity as a pilot. Defendants' indefinite suspension of Plaintiff Arment for flying within 500 feet of the surface and/or flying within 500 feet of an obstacle on December 13, 2001 is not rationally related to Mr. Arment's fitness or capacity to track fish in a frozen river piloting an airplane at low levels for Defendants.

55. Defendants' sanctions against Plaintiffs that include formal classroom instruction and 200 hours low-level flying over one year before reinstatement of Plaintiff Arment's OAS pilot card is not rationally connected with insuring pilot or aircraft safety when Defendants previously approved Plaintiff Arment's flying skills and safety in an OAS flight check on June 11, 2001, refused to test Plaintiff Arment's flying skills and safety in an OAS flight check after the alleged incident occurring on December 13, 2001, and FAA approved Plaintiff Arment's flying skills and safety in an FAA flight check on March 29, 2002.

56. Defendants' determination that Mr. Arment may be excluded from his profession as a low-level flying OAS contract pilot for conduct not rationally related to pilot-in-command judgment, pilot qualifications, pilot experience, pilot safety record, or Plaintiffs record of mission accomplishment violates the constitutional guarantee of Substantive Due Process.

57. Defendants' determination that Defendants are not estopped from sanctioning Plaintiffs for conduct OAS approved while Plaintiff Arment flew low-level flying special use operation flights in Alaska for Defendants violates the constitutional guarantee of Substantive Due Process. Defendants' determination that Defendants are not estopped from sanctioning Plaintiffs for aircraft maneuvers Defendants trained Plaintiffs to perform while low-level flying special use operation flights in Alaska for Defendants violates the constitutional guarantee of Substantive Due Process.

58. Defendants' indefinite suspension of Mr. Arment's previously issued OAS pilot card infringed upon Mr. Arment's constitutionally protected liberty interests. Defendants' indefinite suspension and *de facto* debarment of Plaintiffs deprived Plaintiffs of their constitutionally protected property interests. Defendants' indefinite suspension of Mr. Arment's previously issued OAS card infringed upon Mr. Arment's constitutionally protected liberty interests. Defendants' sanctions impose a stigma or other disability that foreclosed Plaintiff Arment's freedom to take advantage of other employment opportunities. Defendants' indefinite suspension and *de facto* debarment of Plaintiffs deprived Plaintiffs of their constitutionally protected liberty interests.

59. Defendants deprived Plaintiff of substantive due process of law by suspending Mr. Arment's OAS pilot card. Defendants deprived Plaintiffs of substantive due process of law by indefinitely suspending and de fact debarring Plaintiffs from government contracting. Plaintiffs relied to their detriment upon Defendants' representations that low-level flying near the ground surface and obstacles while performing under contracts with Defendants was authorized and safe flying. Defendants denied Plaintiffs substantive due process of law by sanctioning Plaintiffs for conduct Defendants represented to Plaintiffs was authorized and constituted safe flying. Defendants denied Plaintiffs substantive due process of law by sanctioning Plaintiffs for conduct specifically approved of by Defendants.

COUNT II

Violation of the Fifth Amendment to the United States Constitution—Denial of Procedural Due Process—Inadequate Notice

60. Plaintiffs herby incorporate the allegations of paragraphs 1 through 59 as if fully set forth herein.

61. The Fifth Amendment to the *United States Constitution* guarantees to Plaintiffs Procedural Due Process of law when federal agency adverse action deprives Plaintiffs of life, liberty or property.

62. Defendants denied Plaintiff Arment his OAS pilot qualification card and imposed sanctions upon Plaintiffs without providing Plaintiffs adequate notice. Defendants refused to provide Plaintiffs the administrative record upon which Defendants made their determinations. Defendants refused to provide Plaintiffs the investigative report relied upon by Defendants in denying Plaintiff Arment his OAS pilot card and sanctioning Plaintiffs. Defendants refused to provide Plaintiffs witness statements and other information relied upon by Defendants in denying Plaintiff Arment his OAS pilot card and imposing sanctions upon Plaintiffs

63. Defendants refusal to provide Plaintiffs adequate notice deprives Plaintiffs of their protected property interests in violation of the Procedural Due Process Clause of the Fifth Amendment.

64. Defendants refusal to provide Plaintiffs adequate notice deprives Plaintiffs of their protected liberty interests in violation of the Procedural Due Process Clause of the Fifth Amendment.

COUNT III

Violation of the Fifth Amendment to the United States Constitution—Denial of Procedural Due Process—No Hearing

65. Plaintiffs herby incorporate the allegations of paragraphs 1 through 64 as if fully set forth herein.

66. Defendants refused to provide Plaintiffs a hearing when denying Plaintiff Arment his OAS pilot card and imposing sanctions against Plaintiffs. Defendants refused to provide Plaintiffs any meaningful opportunity to respond when denying Plaintiff Arment his OAS pilot card and imposing sanctions against Plaintiffs. Defendants refused to provide Plaintiffs a hearing when suspending Plaintiffs from government contracting.

Defendants refused to provide Plaintiffs any meaningful opportunity to respond when suspending Plaintiffs from government contracting.

67. Defendants refusal to provide Plaintiffs a hearing and any meaningful opportunity to respond deprives Plaintiffs of their protected property interests in violation of the Procedural Due Process Clause of the Fifth Amendment.

68. Defendants refusal to provide Plaintiffs a hearing and any meaningful opportunity to respond deprives Plaintiffs of their protected liberty interests in violation of the Procedural Due Process Clause of the Fifth Amendment.

COUNT IV

Violation of the Fifth Amendment to the United States Constitution—Denial of Procedural Due Process—No Neutral and Detached Decisionmaker

69. Plaintiffs herby incorporate the allegations of paragraphs 1 through 68 as if fully set forth herein.

70. The Fifth Amendment's Procedural Due Process Clause guarantees Plaintiffs that administrative proceedings which adjudicate their interests in life, liberty, or property be free from bias. Defendants provided Plaintiffs no pre-deprivation hearing. Defendants Galloway and Smith presided at subsequent stages in Defendants' administrative procedure suspending Plaintiff Arment's OAS pilot card and excluding Plaintiffs from federal contracting.

71. Defendant Galloway prejudged the sanctions outcome by taking Plaintiff Arment's OAS pilot card before completing his investigation. Defendant Galloway prejudged the sanctions outcome against Plaintiffs by taking Plaintiff Arment's OAS pilot card for an "aviation hazard" not authorized as grounds for suspension under the OAS ARA. Defendant Galloway's prejudgments about the sanctions outcome against Plaintiffs constitute unlawful bias.

72. Defendant Smith's 11 month delay in making his determinations dated May 6, 2003 without providing Plaintiffs due process of law constitutes unlawful bias against Plaintiffs. Defendant Smith's citation to *Administrator v. Scollan,* 2 NTSB 538 (1973) (Ex. 4)

that specifically provides for FAA notice and hearing on the record before an administrative law judge imposes any suspension of a pilot's FAA certificate shows he knew he was violating Plaintiffs constitutional rights. Defendant Smith's refusal to furnish Plaintiffs a copy of the administrative record, including the investigative report, witness statements, and other OAS information other than through the Freedom of Information Act with Plaintiffs first agreeing to pay $810 was unreasonable and unlawful. Defendant Smith's requirement that Plaintiffs' only administrative remedy is to ask him to reconsider providing Plaintiffs provide additional substantive evidence without disclosing Defendants' administrative record to Plaintiffs is unreasonable and unlawful. Defendant Smith's imposition of sanction conditions that Plaintiffs cannot perform or can perform only at unreasonable cost with protracted delay is unreasonable and unlawful. Defendant Smith's conduct was impermissibly biased against Plaintiffs.

73. Defendants' failure to provide Plaintiffs a neutral and detached decisionmaker deprives Plaintiffs of their protected liberty interests in violation of the Procedural Due Process Clause of the Fifth Amendment.

74. Defendants' failure to provide Plaintiffs a neutral and detached decisionmaker deprives Plaintiffs of their protected property interests in violation of the Procedural Due Process Clause of the Fifth Amendment.

COUNT V

Violation of the Fifth Amendment to the United States Constitution—Due Process—Imposition of Sanctions for Violations of Rules Vague on their Face and as Applied to Plaintiffs

75. Plaintiffs herby incorporate the allegations of paragraphs 1 through 74 as if fully set forth herein.

76. Facially and as applied to Plaintiffs, Defendants' imposition of sanctions based on Defendants' rules violate the void-for-vagueness doctrine of the Due Process Clause of the Fifth Amendment to the *United States Constitution*.

77. Defendants' rule that "[t]he pilot shall refuse any flight or landing which is considered hazardous or unsafe" if flying under 200 feet on an authorized low-level flight not knowing the exact location and height of every possible obstacle when such operations are very dangerous because at and below 200 feet AGL there are numerous power lines, and antenna towers that are not marked and lighted as obstructions and therefore may not be seen in time to avoid a collision is facially vague.

78. Defendants imposed sanctions against Plaintiffs for flying closer than 500 feet to a power line while flying a low-level special operations fish tracking flight pursuant to a contract with Defendants that allows flying within 500 feet horizontally from an obstacle. Imposing sanctions against Plaintiffs for safely avoiding the inexact location of a power line hazard while flying an authorized low-level flight violates the void-for-vagueness doctrine.

79. Defendants' rule that safely avoiding an inexact location of a power line hazard within 500 feet as pilot-in-command flying an authorized low-level flight violates FAA Federal Aviation Regulation § 91.119(c) when excepting Plaintiff Arment from FAA Federal Aviation Regulation § 135.203's requirement to not fly within 500 feet horizontally from any obstacle is facially vague.

80. Defendants' rule that:

> within 5 days of an event, .. to submit to the OAS/USFS ASM a "SAFECOM" to report any condition, observance, act, maintenance problem, or circumstance which has the potential to cause an aviation-related mishap.

is facially vague. Defendants define "mishap" as "aircraft accidents, incidents with potential, aircraft incidents, aviation hazards and aircraft maintenance deficiencies." Defendants' definition of "mishap" is facially vague. Defendants define "aviation hazard" as "any condition, act or set of circumstances that exposes an individual to unnecessary risk or harm during aviation operations." Defendants' definition of "aviation hazard" is facially vague. Defendants' define "incident with potential" as "an incident that narrowly misses being an accident and in which the circumstances indicate significant potential for substantial damage or serious injury." Defendants' definition of "incident with potential" is facially vague.

81. Defendants imposed sanctions against Plaintiffs for flying at and below 200 feet from ground surface where there are numerous power lines, and antenna towers, hazards that are not marked and lighted and are not always readily visible with the wires being virtually impossible to see under certain conditions. Defendants' imposition of sanctions against Plaintiffs for failing to report safely detecting and avoiding a power line hazard less than 200 feet from the ground and in time to avoid a collision while flying an authorized low-level special operations fish tracking flight pursuant to a contract with Defendants violates the void-for-vagueness doctrine.

COUNT VI

Violation of the Fifth Amendment to the United States Constitution—Unauthorized Taking Without Just Compensation

82. Plaintiffs herby incorporate the allegations of paragraphs 1 through 81 as if fully set forth herein.

83. Defendants' suspension of Plaintiff Arment's OAS pilot card constitutes a taking of property under the Takings Clause of the Fifth Amendment to the *United States Constitution.*

84. Defendants' suspension of Plaintiffs from federal government contracting constitutes a taking of property under the Takings Clause of the Fifth Amendment to the *United States Constitution.*

85. Justice and fairness require that economic injuries suffered by Plaintiffs caused by Defendants' actions must be deemed a compensable taking of Plaintiffs' property. Plaintiffs' expectation that their investment in low-level special use operations flying skills and aircraft to maintain eligibility and competitiveness for awards of federal contracts is reasonable.

86. Defendants taking Plaintiff Arment's OAS pilot card was unauthorized conduct and *ultra vires* agency action. Defendants exceeded their authority under the relevant laws or regulations. No administrative remedies are available to Plaintiffs.

87. The economic impact upon Plaintiffs is substantial and devastating. Plaintiff Research Air has incurred uncompensated expenses and lost a substantial amount of money since March 2002 because of Defendants' suspension of Plaintiff's Arment's OAS pilot card.

Plaintiff Arment has incurred substantial expenses and lost a substantial amount of income because of Defendants' suspension of Plaintiff's Arment's OAS pilot card. Defendants' exclusion of Plaintiffs from federal government contracting has prevented Plaintiffs from receiving contract awards to earn income to offset recurring maintenance, inspection and licensing fees. Plaintiff Research Air's aircraft is now a wasted asset. Plaintiff Arment's low-level flying experience and skills is now a wasted asset.

88. Defendants' takings of Plaintiffs' property was a private taking. Plaintiffs are entitled to just compensation from Defendants for Defendants unlawful and draconian taking of Plaintiffs' property that caused substantial economic injuries to Plaintiffs.

COUNT VII

Violation of the Administrative Procedure Act—Agency Action Without Lawful Authority

89. Plaintiffs herby incorporate the allegations of paragraphs 1 through 88 as if fully set forth herein.

90. Statutory authority for regulating navigable airspace and for promulgating safety standards and regulations is found in the Federal Aviation Act, 49 U.S.C. § 40103. The Federal Aviation Administration is the sole agency authorized to suspend or revoke pilot certificates pursuant to the Federal Aviation Act subject to review by the National Transportation Safety Board and the federal courts of appeal. FAA Federal Aviation Regulation Parts 61 and 67 provide rules for issuing pilot certificates. Congress expressly gave the FAA broad authority to grant exemptions from safety regulations, including minimum safe altitudes, "when the Administrator decides the exemption is in the public interest." 49 U.S.C. § 40109(b). Defendants lack delegated rulemaking authority to issue rules regulating the navigable airspace and airplane pilot safety.

91. Proper procedures for initiating and imposing suspensions and debarments from government contracting are found in the Federal Acquisition Regulations, 41 CFR Subpart 9.4, and Executive Order 12689.

92. Suspensions and debarment from government contracting must be accomplished pursuant to validly promulgated agency reg-

ulations. Defendants' indefinite suspension and *de facto* debarment of Plaintiffs is in violation of the Federal Acquisition Regulation 41 CFR Subpart 9.4. Defendants indefinite suspension and *de facto* debarment of Plaintiffs is in violation of the Department of Interior suspension and debarment regulations, 43 CFR Part 12.

93. Defendants' OAS pilot interagency qualification card and suspension procedures violate the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553(c). Defendants' indefinite suspension and *de facto* debarment of Plaintiffs violates the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553(c). Defendants' failure to publish in the *Federal Register* the OAS card requirement and rules for suspending or revoking the OAS card violates 5 U.S.C. § 552(a)(1). Defendants' failure to publish in the *Federal Register* the OAS "incident-with-potential" and SAFECOM reporting requirements violates 5 U.S.C. § 552(a)(1).

94. Defendants committed prejudicial error by withholding and denying to Plaintiff Arment his OAS pilot card pursuant to sanctions imposed for violations of rules not promulgated in accordance with the Administrative Procedure Act. Defendants committed prejudicial error by withholding and denying to Plaintiffs federal government contract awards pursuant to sanctions imposed for violations of rules not promulgated in accordance with the Administrative Procedure Act.

COUNT VIII

Violation of the Administrative Procedure Act—Arbitrary and Capricious Agency Action and Agency Action Lacking a Rational Basis

95. Plaintiffs herby incorporate the allegations of paragraphs 1 through 94 as if fully set forth herein.

96. Defendant Smith's determination that Mr. Arment "intentionally flew under a set of power lines that are estimated to range between 60 and 165 feet above the terrain [and] [i]n doing so you actually came in contact and made tracks on the frozen river below the wires" while tracking fish in underneath a frozen river piloting an airplane flying low-level special use operations for Defendant

Interior does not rationally support a conclusion that Mr. Arment is an unsafe or incompetent pilot necessitating an indefinite suspension and *de facto* debarment.

97. Defendants' adverse agency action against Plaintiffs has no rational connection between the facts found of flying underneath an electrical wire and touching ice on a river with landing gear while chasing fish in the river piloting an airplane for Defendants and the choice made to indefinitely suspend and *de facto* debar Plaintiffs from any federal agency flying.

98. Defendant Smith's determination that because Mr. Arment "willingly operated the aircraft at an altitude that resulted in the situation where you were forced to evade power lines and this altitude was not uncommon to the standard profile you had used on previous similar missions" does not rationally support a conclusion that Mr. Arment is an unsafe or incompetent pilot necessitating an indefinite suspension and *de facto* debarment.

99. Defendants' imposition of sanctions upon Mr. Arment has no rational connection between the facts found of flying underneath an electrical wire and touching ice with landing gear while chasing fish piloting an airplane for Defendants and the choice made to impose classroom instruction, written certification, and flying hours as conditions for reinstatement.

100. Defendant Smith's determination that Mr. Arment "attempted to minimize and downplay this event and in fact, based on interviews, told the passenger and the dispatcher that the event was not an 'incident'" upon Mr. Arment's honest belief based on his 6,000 hours and 28 years of low level flying experience for Defendants, that did not affect or could not affect the safety of aircraft operations, and lack of any accident or substantial damage or any bodily injury does not rationally support a conclusion that Mr. Arment is an unsafe or incompetent pilot necessitating an indefinite suspension and *de facto* debarment.

101. Defendant Smith's determination that Mr. Arment who has already qualified under OAS's experience requirements for low-level flying special use operations for 200 hours and one year before he will be deemed qualified by OAS is arbitrary and capricious and lacks a rational basis.

102. Defendant Smith's determination that Mr. Arment must attend school to learn how to obey authority is to apply in the cockpit while piloting an aircraft flying low-level special use operations for Defendant Interior is arbitrary and capricious and lacks a rational basis.

103. Defendant Smith's determination that Mr. Arment must attend school to learn risk analysis and management to apply in the cockpit while piloting an aircraft while flying low-level special use operations for Defendant Interior is arbitrary and capricious and lacks a rational basis.

104. Defendant Smith's determination that Mr. Arment must attend school to learn accident prevention with emphasis "in human factors and cockpit resource management" to apply in the cockpit while piloting an aircraft while flying low-level special use operations for Defendant DOI is arbitrary and capricious and lacks a rational basis.

105. Defendant Smith's determination that Mr. Arment must take classroom instruction and training before ending the indefinite suspension and *de facto* debarring of Plaintiffs on subjects having nothing to do with deciding in the cockpit while piloting an aircraft whether to avoid an electrical wire by flying underneath the wire while flying low-level special use operations for Department of Interior is arbitrary and capricious and lacks a rational basis.

106. Defendant Smith's determination that Mr. Arment must take classroom instruction and training before ending the indefinite suspension and *de facto* debarment of Plaintiffs on subjects having nothing to do with deciding in the cockpit while piloting an aircraft whether to roll landing gear wheels momentarily on river ice while chasing fish in the river while flying low-level special use operations for Department of Interior is arbitrary and capricious and lacks a rational basis.

107. Defendant Smith's determination not to have Mr. Arment take a flight check following the alleged Incident-with-Potential, but to have Mr. Arment fly a "post Incident-with-Potential flight evaluation more than two years after the alleged incident, only after receiving prescribed classroom instruction and completing a one year 200 hours low-level flying requirement, lacks a rational basis and is arbitrary and capricious agency action.

108. The conduct alleged above against Defendants constitutes arbitrary and capricious agency action and agency action lacking a rational basis constituting prejudicial error committed against Plaintiffs in violation of the Administrative Procedure Act.

COUNT IX

Violation of the Administrative Procedure Act—Agency Action Lacking Any Substantial Evidence in the Record

109. Plaintiffs herby incorporate the allegations of paragraphs 1 through 108 as if fully set forth herein.

110. Defendant Smith's conclusion that Mr. Arment's OAS card must be indefinitely suspended until he completes classroom instruction and training and 200 hours of low level flying over the period of one year lacks any supporting substantial evidence in the record.

111. Defendants indefinite suspension and *de facto* debarment of Plaintiffs from government contracting lacks any supporting substantial evidence in the record. There is no evidence in the record of past unsafe flying, failure to comply with valid contract terms, or lack of business integrity. There is no substantial evidence that outweighs Plaintiffs' evidence of safe flying. There is no evidence of the mitigating facts considered by Defendants before imposing sanctions against Plaintiffs.

112. Defendants committed prejudicial error by withholding and denying Plaintiff Arment his OAS pilot card without substantial evidence in the record. Defendants committed prejudicial error by imposing the indefinite suspension and *de facto* debarment of Plaintiffs without substantial evidence in the record.

COUNT X

Bivens Constitutional Violations - Individual Agency Officials

113. Plaintiffs herby incorporate the allegations of paragraphs 1 through 112 as if fully set forth herein.

114. Defendant Smith had no lawful administrative discretion to suspend or terminate Plaintiffs' government contracts. Defendant Smith had no lawful administrative discretion to suspend or debar

Plaintiffs from procurement contracting or participation in nonprocurement programs.

115. Defendant Galloway had no lawful administrative discretion to suspend or terminate Plaintiffs' government contracts. Defendant Galloway had no lawful administrative discretion to suspend or debar Plaintiffs from procurement contracting or participation in nonprocurement programs.

116. Defendants Smith and Galloway did not provide Plaintiffs clear notice of the charges against them and a fair opportunity to prepare a defense. Defendant Smith did not provide Plaintiffs their rights to a full hearing before an disinterested agency official such as an Administrative Law Judge during which the Defendants carried the burden of proof. Defendants Smith and Galloway did not provide Plaintiffs due process protections to redress any preceding mistakes that may have occurred during the agency investigation. Defendant Smith did not provide Plaintiffs post-deprivation procedures under Defendant DOI regulations or the Federal Acquisition Regulations that satisfy the requirements of procedural due process.

117. Plaintiffs' constitutional rights to due process of law including their constitutional rights to procedural due process were clearly established in 2002 and 2003. Plaintiffs' constitutional rights to substantive due process of law including freedom from irrational governmental action was clearly established in 2002 and 2003.

118. Defendant Smith's conduct was done with reckless or callous indifference to Plaintiffs' federally protected rights.

119. Defendant Galloway's conduct was done with reckless or callous indifference to Plaintiffs' federally protected rights.

DAMAGES ALLEGATIONS

120. As a result of Defendants' actions Plaintiffs have suffered injuries entitling them to nominal, compensatory and punitive damages under Counts I - V and Count X. Defendants' actions constitute outrageous indifference to Plaintiffs rights.

121. As a result of Defendants actions Plaintiff Arment has suffered mental anguish and distress and physical injury.

122. Plaintiffs demand damages from Defendants Department of Interior and/or United States in the amount of $300,000 or such greater amount that may be proved at trial on Count VI.

123. Plaintiffs demand damages from Defendant Smith in his individual capacity in the amount of $10,000 compensatory damages and $20,000 punitive damages on Count X.

124. Plaintiffs demand damages from Defendant Galloway in his individual capacity in the amount of $10,000 compensatory damages and $20,000 punitive damages on Count X.

125. Defendants' position is not substantially justified.

126. Plaintiffs are entitled to recover their attorneys fees, expert witness fees, and costs from Defendants.

JURY TRIAL DEMAND

Plaintiffs demand trial by jury on all counts trial by jury is allowed.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs respectfully request entry of a judgment or other form of order:

A. Compelling Defendants to cease unlawfully withholding or unreasonably delaying return of Plaintiff Arment's OAS pilot card;

B. Compelling Defendants to cease unlawfully withholding or unreasonably delaying reinstatement Plaintiffs to all Defendants' OAS vendor pilot and aircraft lists;

C. Setting aside as void *ab initio* Defendants' suspension of Plaintiff Arment's OAS pilot card;

D. Setting aside as void *ab initio* Defendants' suspension, exclusion or debarment of Plaintiffs from federal government contracting, including contracts awarded under the OAS ARA;

E. Declaring the March 27, 2002 suspension and May 6, 2003 sanctions orders contrary to law, and to have violated Plaintiffs' rights under the Fifth Amendment to the *United States Constitution* and under the Administrative Procedure Act;

F. Directing Defendants to expunge all records constituting the adverse suspension sanction orders against Plaintiffs;

G. Granting preliminary and permanent injunctive relief enjoining defendants from taking any action to exclude Plaintiffs from government contracting or any nonprocurement program based upon the March 27, 2002 and May 6, 2003 suspension and sanctions order.

H. Award Plaintiffs' their damages as set forth above including prejudgment and postjudgment interest, reasonable attorneys fees, disbursements, and costs in this action including the underlying administrative proceedings.

I. Grant such other relief that is equitable, just and proper.

Respectfully submitted,

Date: July 2, 2003

/s/ Michael H. Ditton
Attorney at Law
2210 Bridger Drive
Bozeman, Montana 59715
(406) 587-7386 (voice/facsimile)
VSB No. 21913
D.C. Bar No. 434646
Attorney for Research Air, Inc.
and Charles R. Arment

Date: July 2, 2003

/s/ Patrick D. McGee
120 West Granite Street
Butte, MT 59701

APPENDIX P

US COURT OF APPEALS FOR THE NINTH CIRCUIT

CASE SUMMARY

Court of Appeals Docket #: 04-70454

[Filed: February 2, 2004]

NSUIT: 0

RESEARCH AIR, INC.,, ET AL

V.

USDC-MBU

APPEAL FROM: DISTRICT OF MONTANA (BUTTE)

LOWER COURT INFORMATION:
DISTRICT: 0977-2 : CV-03-00054-RFC
PRESIDING JUDGE: RICHARD F. CEBULL,
DISTRICT JUDGE

2/9/04 Rec'd petrs' Research Air, Inc. supplement to his mtn for expedited consideration of petition for writ of mandamus; served on 2/5/04. [4963638-1] (MOATT) [04-70454] (ea)

2/25/04 Order filed. Petrs have not demonstrated that this case warrants the intervention of this ct by means of the extraordinary remedy of mandamus. Accordingly, the petition is denied. All pending mtns are denied as moot.

DENIED

(Terminated on the Merits after Submission Without Oral Hearing; Denied; Written, Unsigned, Unpublished. Ferdinand F. Fernandez, William A. Fletcher, Richard C. Tallman)

(FAXED BY REE) [04-70454] (EA)

3/22/04 Rec'd petrs' Research Air, Inc. mtn for reconsideration entitled " Petition for rehearing & suggestion for rehear-

ing *en banc*"; served on 3/17/04. (LATE) (MOATT) [04-70454] [5010353] [04-70454] (ea)

4/5/04 Filed order MOATT (CD) The petition for rehearing & suggestion for rehearing *en banc* is denied as untimely. [5010353-1] [04-70454] (ea)

4/16/04 Rec'd petrs' Research Air, Inc. mtn to vacate illegal order & file petition for rehearing & suggestion for rehearing *en banc*; served on 4/13/04. (MOATT) [04-70454] [5035743] [04-70454] (ea)

5/3/04 Rec'd Michael H. Ditton's ltr, csl for petr, Research Air, Inc., dated 4/28/04 re: request facts & circumstances of these matters. (MOATT) [04-70454] (ea)

5/13/04 Received (case closed) Petitioners' petition for writ of mandamus and prohibition fourth addendum; served on 05/10/04. (Casefile) [04-70454] (dv)

5/17/04 Filed order (Alex KOZINSKI, Richard A. PAEZ) Petrs' mtn to vacate the Clk's 4/5/04 order & file petrs' petition for rehearing & rehearing en banc is denied. Any request for rehearing of an order filed by a mtns panel msut be filed within 14 days from the date of the mtns panel order. No mtns for recon, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket. [5035743-1] [5010353-1] [04-70454] (ea)

APPENDIX Q

U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

CASE SUMMARY

COURT OF APPEALS DOCKET #: 04-70572 [Filed: February 2, 2004]

Nsuit: 0

RESEARCH AIR, INC., ET AL V. USDC-MOB

APPEAL FROM: DISTRICT OF MONTANA (BILLINGS)

LOWER COURT INFORMATION:
DISTRICT: 0977-1 : 2/2/04

PRESIDING JUDGE: RICHARD F. CEBULL, DISTRICT JUDGE

2/2/04	Filed petition for writ of mand, docketed cause and entered appearances of counsel. notified real parties in interest of filing. (moatt) [04-70572] (tm)
2/2/04	Received Petitioner Research Air, Inc., Petitioner Charles R. Arment's motion to expedite appeal; served on 1/31/04 (MOATT) [04-70572] (tm)
2/17/04	Filed order MOATT (D) review of dkt reflects dkt/filing fee remain due; within 14 days of order petitioners shall pay $255 to dc and provide this ct w/proof of payment or file mtn w/this ct to proceed ifp; failure to pay fee or file mtn

shall result in automatic dismissal of appeal for failure to prosecute 42-1. [04-70572] (je)

2/23/04 Received Petitioner Research Air, Inc., *FAXED* letter dated 2/23/04 re: Two different docket numbers for the same case appear. Already paid the fee. [04-70572] (Original received on 2/27/04) (ba)

2/27/04 Terminated Case: Opened in Error duplicate of 04-70454 [04-70572] (tm)

3/5/04 Received Petitioner Research Air, Inc. letter dated 3/1/04 re: Objects to dismissal of appeal in 04-70454. [04-70572] (ba)

3/5/04 Received Petitioner Research Air, Inc. letter dated 3/3/04 re: Typo in 3/1/04 letter appeared in citation to 28 U.S.C. [04-70572] (ba)

APPENDIX R

U.S. DISTRICT COURT
U.S. DISTRICT COURT OF MONTANA (BUTTE)

Civil Docket for Case #: 03-CV-54

RESEARCH AIR, INC., ET AL

V.

NORTON, ET AL

[Filed: July 2, 2003]

Assigned to: Judge Richard F. Cebull
Demand: $360,000,000
Nature of Suit: 440
Lead Docket: None
Jurisdiction: US Defendant
Dkt# in other court: None
Cause: 05:551 Administrative Procedure Act

RESEARCH AIR, INC.,
Plaintiff

Francis P. McGee
[term 01/30/04]
[COR LD NTC ret]
ATTORNEY AT LAW
120 West Granite Street
Butte, MT 59701-9216
406-782-1136
FTS 782-0703

Michael H. Ditton
[COR LD NTC ret]
2210 Bridger Drive

	Bozeman, MT 59715 406-587-7386
CHARLES R. ARMENT *Plaintiff*	Francis P. McGee [term 01/30/04] (See above) [COR LD NTC ret] Michael H. Ditton (See above) [COR LD NTC ret]
v.	
GALE A. NORTON *Defendant*	George F. Darragh, Jr. [COR LD NTC ret] OFFICE OF THE U.S. ATTORNEY PO Box 3447 119 1st Avenue North Suite 300 Great Falls, MT 59403-3447 406-761-7715 FTS 453-9973
STEVEN R. SMITH, Director, West Area Office of Aircraft Services *Defendant*	
ROBERT GALLOWAY, Aviation Safety Manager *Defendant*	
DEPARTMENT OF INTERIOR *Defendant*	
USA *Defendant*	George F. Darragh, Jr. (See above) [COR LD NTC cja]

DOCKET PROCEEDINGS

Date	#	Docket Entry
7/2/03	1	COMPLAINT FOR DAMAGES, INJUNCTIVE, AND DECLARATORY RELIEF - 5 Original Summonses issued to cnsl for service. (ell) [Entry date 07/03/03] [Edit date 07/03/03]
7/2/03	2	MOTION by plaintiff Research Air, Inc., plaintiff Charles R. Arment for attorney Michael H. Ditton to appear *pro hac vice* (ell) [Entry date 07/03/03]
7/2/03	3	MOTION by plaintiff Research Air, Inc., plaintiff Charles R. Arment for temporary restraining order with attached pla afdt in support of Application for Temporary Restraining Order (ell) [Entry date 07/03/03] [Edit date 07/03/03]
7/2/03	4	MOTION by plaintiff Research Air, Inc., plaintiff Charles R. Arment for preliminary injunction (ell) Entry date 07/03/03]
7/2/03	–	Lodged PROPOSED Order submitted by plaintiff Research Air, Inc., plaintiff Charles R. Arment RE Motions 3 and 4. (ell) [Entry date 07/03/03]
7/3/03	–	FILING FEE PAID: on 7/3/03 in the amount of $ 150.00, receipt # 30029. (ell)
7/3/03	–	FILE DELIVERED to Billings Clerk's Office for Review by Judge Cebull. File sent certified RRR #7002 2030 0000 8022 2264. (ell)
7/7/03	–	FILE DELIVERED to RFC's chambers for App for TRO & PHV (hmm)
7/9/03	5	ORDER by Judge Richard F. Cebull regarding [4-1] which is Motion for Preliminary Injunction, denying motion for temporary restraining order [3-1], denying motion for attorney Michael H. Ditton to appear pro hac vice [2-1] ; in-court hearing on Motion for Preliminary Injunction set for 2:00 7/24/03 (cc: all counsel) (rmw) [Entry date 07/10/03]

7/10/03	6	MEMORANDUM/BRIEF by plaintiff Research Air, Inc., plaintiff Charles R. Arment in support of motion for preliminary injunction [4-1] (ell)
7/10/03	–	REMARK - Sent Document #6 with copy to Billings Clerk's Office. (ell)
7/17/03	7	RETURN OF SERVICE EXECUTED upon defendant Gale A. Norton on 7/8/03 (crm)
7/17/03	8	RETURN OF SERVICE EXECUTED upon defendant Steven R. Smith on 7/7/03 (crm)
7/17/03	9	RETURN OF SERVICE EXECUTED upon defendant Robert Galloway on 7/7/03 (crm)
7/17/03	10	RETURN OF SERVICE EXECUTED upon defendant DOI on 7/7/03 (crm)
7/17/03	11	RETURN OF SERVICE EXECUTED upon defendant USA on 7/7/03 (crm)
7/23/03	12	RESPONSE by defendant USA to motion for preliminary injunction [4-1] (snyb) [Entry date 07/24/03]
7/23/03	13	DECLARATION of Robert Galloway by defendant USA re [12-1] (snyb) [Entry date 07/24/03]
7/23/03	14	DECLARATION of Steve R. Smith by defendant USA re [12-1] (snyb) [Entry date 07/24/03]
7/23/03	15	DECLARATION of Samuel R. Stivison by defendant USA re [12-1] (snyb) [Entry date 07/24/03]
7/24/03	16	ATTORNEY APPEARANCE for plaintiff Research Air, Inc., plaintiff Charles R. Arment by Frank McGee (ell)
7/24/03	–	REMARK - Mailed document #16 to Clerk's Office in Billings. (ell)
7/24/03	17	MINUTES: HEARING on pltf's motion held 7/24/03. Cnsl Francis McGee present for pltf and Tim Cavan present for the Govt. Stmts by the Court and both cnsl. The Court is taking under advisement on 7/24/03 the motion for preliminary injunction [4-1] ; In-court

		hearing held 7/24/03 before Judge Richard F. Cebull. C/R: Sharon Gaughan, Law Clerk Lee Merreot and courtroom deputy Susan Nybo (snyb) [Entry date 07/25/03]
7/25/03	18	ORDER by Judge Richard F. Cebull regarding [17-2] minutes of hearing held 07/24/03. The U.S. shall provide Plaintiffs with the administrative record pertaining to this cause of action; Plaintiffs shall have 30 days from the date they receive the record to file a response to the brief submitted by the US; The US will then have 10 days to respond to any new issues brought up by Plaintiffs (cc: all counsel) (clr)
8/18/03	19	NOTICE by defendant USA of filing of Administrative Record. (caa) [Entry date 08/19/03]
8/18/03	20	TRANSCRIPT filed of Administrative Record (3-ring binder filed separately in brown expando) (caa) [Entry date 08/19/03]
8/19/03	–	FILE DELIVERED to RFC for review of Administrative Record caa)
8/20/03	–	FILE DELIVERED to clerk's office for re-filing (snyb)
9/5/03	21	MOTION by defendant USA to dismiss (clr) [Entry date 09/09/03]
9/5/03	22	MEMORANDUM/BRIEF by defendant USA in support of motion to dismiss [21-1] (clr) [Entry date 09/09/03]
9/11/03	23	MOTION by plaintiff Research Air, Inc. for leave to file Brief in excess of 20 pages. (ell)
9/11/03	–	Lodged PROPOSED Response Brief to Dft's Opposition to Preliminary Injunction and Response to Administrative Record submitted by plaintiff Research Air, Inc. (ell)
9/11/03	–	REMARK—Mailed document #23 with proposed document and copies to Clerk's Office for Review by Judge Cebull. (ell)

9/16/03	24	RESPONSE by plaintiff Research Air, Inc., plaintiff Charles R. Arment to motion to dismiss [21-1] (crm)
9/16/03	–	FILE DELIVERED to RFC for review of # 23 etc. (rmw)
9/23/03	25	ORDER by Judge Richard F. Cebull granting motion for leave to file Brief in excess of 20 pages. [23-1] (cc: all counsel) (snyb)
9/23/03	26	RESPONSE by plaintiff Research Air, Inc., plaintiff Charles R. Arment to motion for preliminary injunction [4-1] (snyb)
9/23/03	–	FILE DELIVERED to motions drawer for 10/7/03 (snyb)
9/23/03	27	AMENDED RESPONSE re[24-1] by plaintiff Research Air, Inc. to motion to dismiss [21-1](doc actually filed 9/22/03) (crm) [Entry date 09/25/03] [Edit date 09/25/03]
9/23/03	28	AMENDED RESPONSE re[26-1] by plaintiff Research Air, Inc. to motion for preliminary injunction [4-1] (doc actually filed 9/22/03) (crm) [Entry date 09/25/03]
9/25/03	29	NOTICE TO THE COURT by defendant USA (ell) [Entry date 09/29/03]
9/25/03	30	UNOPPOSED MOTION by defendant USA to extend time for dft to file reply brief to pla's response brief in opposition to dfts motion to dismiss (ell) [Entry date 09/29/03]
9/25/03	–	Lodged PROPOSED Order submitted by defendant USA RE Motion #30. (ell) [Entry date 09/29/03]
9/26/03	–	BEGIN VOLUME #2 WITH DOCUMENT # 31, 88 (snyb) [Entry date 10/05/03]
9/29/03	–	REMARK - Mailed document #29 and 30 with copies and Proposed Order to Clerk's Office in Billings for Review by Judge Cebull. (ell) .

9/29/03 – FILE DELIVERED to motions drawer for 10/8/03 (caa)

9/29/03 31 PETITION/MOTION for order for admission with waiver by Michael H. Ditton (ell)

9/29/03 – REMARK—Mailed document #31 with copy to Clerk's Office in Billings. (ell)

10/3/03 32 ORDER by Judge Richard F. Cebull granting motion to extend time for dft to file reply brief to pla's response brief in opposition to dfts motion to dismiss [30-1] ; setting date for reply brief ddl set for 10/20/03 for USA, for DOI, for Robert Galloway, for Steven R. Smith, for Gale A. Norton to file a reply to their motion to dismiss (cc: all counsel) (snyb) [Entry date 10/05/03]

10/5/03 – FILE DELIVERED to RFC for review of motion & Notice (snyb)

10/15/03 33 ORDER by Judge Richard F. Cebull denying motion for orderfor admission with waiver by cnsl Michael Ditton [31-1] (cc: all counsel) (snyb)

10/20/03 34 MOTION by defendant USA for leave to file a reply to pla resp brf to dfts mot to dismiss exceeding 10 pages (ell) [Entry date 10/21/03]

10/20/03 – Lodged PROPOSED Defendant's Reply to Pla Response Brf to Dft's Mot to Dismiss submitted by defendant USA (ell) [Entry date 10/21/03]

10/20/03 – Lodged PROPOSED Order submitted by defendant USA Re Motion #34. (ell) [Entry date 10/21/03]

10/21/03 – REMARK - Mailed document #34 with copy and Proposed documents to Clerk's Office in Billings for Review by Judge Cebull. (ell)

10/22/03 – FILE DELIVERED to RFC for review of prop order (snyb)

10/24/03 35 ORDER by Judge Richard F. Cebull granting motion forleave to file a reply to pla resp brf to dfts mot

todismiss exceeding 10 pages [34-1] (cc: all counsel) (hmm) [Entry date 10/27/03]

10/29/03 36 RETURN OF SERVICE EXECUTED upon defendant Robert Galloway on 10/23/03 (crm)

10/29/03 37 RETURN OF SERVICE EXECUTED upon defendant Steven R. Smith on 10/23/03 (crm)

11/12/03 38 MOTION by plaintiff Research Air, Inc., plaintiff Charles R. Arment for leave to file surrebuttal to dfts reply to pla response to dfts motion to dismiss (ell)

11/20/03 – FILE DELIVERED to RFC for review of # 38 and the Orig rebuttal is attached to #38 (snyb)

11/20/03 39 MOTION by Patrick D. McGee and Francis P. McGee to withdraw as attorney, and to file supporting affidavit under seal (crm) [Corrected by MHD]

11/20/03 – PROPOSED ORDER re[39-1], re[39-2] submitted by plaintiff Research Air, Inc., plaintiff Charles R. Arment, (crm)

11/20/03 – PROPOSED AFFIDAVIT submitted by Patrick D. McGee and Francis P. McGee re[39-2] (crm) [Edit date 11/20/03]

11/24/03 40 ORDER by Judge Richard F. Cebull granting motion to file supporting affidavit under seal [39-2] (cc: all counsel) (caa)

11/24/03 41 SEALED AFFIDAVIT of Francis McGee by plaintiff Research Air, Inc., plaintiff Charles R. Arment (caa)

11/24/03 – FILE DELIVERED to LM for review (caa)

12/2/03 42 RESPONSE by defendant USA to motion for leave to file surrebuttal to dfts reply to pla response to dfts motion to dismiss [38-1] (ell) [Entry date 12/03/03]

12/3/03 – REMARK—Mailed document #42 with copy to Clerk's Office in Billings. (ell)

1/7/04 43 ORDER by Judge Richard F. Cebull setting hearing on motion for Patrick D. McGee and Francis P. McGee to

withdraw as attorneys [39-1] for 2:00 pm on 1/30/04 (cc: all counsel) (snyb)

1/7/04 – REMARK- copy of order # 43 mailed to Mr. Arment at Research Air's address , 225 Coulee Dr., Bozeman, MT (snyb)

1/8/04 44 CERTIFICATE OF SERVICE/NOTICE by plaintiff Research Air, Inc., plaintiff Charles R. Arment (ell)

1/8/04 – REMARK - Mailed document #44 w/cpy to Clk's ofc in Blgs. (ell)

1/30/04 45 MINUTES: Hearing on motion to withdraw as plaintiffs' cnsl held 1/30/04 before Judge Cebull. Present were Pat McGee and Francis McGee for the plaintiffs, (Michael Ditton and Charles Arment in the gallery), George Darragh for the dft. Brief comments by cnsl Francis McGee. Crt is granting motion for Patrick D. McGee and Francis P. McGee to withdraw as attorney [39-1] attorney Francis P. McGee for Charles R. Arment, attorney Francis P. McGee for Research Air, Inc. ; and case management ddl set for 2/19/04 for plaintiff to submit the name of new counsel. C/R: JoAnn Bacheller; L/C: Lee Merreot; Clerk: Cheri Anderson. (caa) [Edit date 02/03/04]

2/2/04 46 ORDER by Judge Richard F. Cebull regarding [45-2] which are the minutes of the hrg held 1/30/04. Francis McGee's motion to withdraw as cnsl of record for pltf is granted. Further the pltfs have 20 days from this order to notify the court of replacement cnsl. (cc: all counsel) (snyb) [Edit date 02/03/04]

2/2/04 – FILE DELIVERED to motions drawer for 2/23/04 for plaintiffs to notify the court of new counsel. (caa)

2/3/04 – REMARK- mailed copy of court's 2/2/04 order to pltf Mr. Arment at Research Air's address, 225 Coulee Dr., Bozeman, MT 59715 (snyb)

2/27/04 – FILE DELIVERED to RFC's chambers for review (hmm)

2/27/04	–	FILE DELIVERED to motions drawer for 3/15/04 (snyb)
3/1/04	47	CERTIFIED COPY of Appellate Court Order: Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. Accordingly, the petition is denied. All pending motions are denied as moot (crm)
3/18/04	–	FILE DELIVERED to RFC (LM) for review (caa)
3/30/04	48	ORDER by Judge Richard F. Cebull ; case management ddl set for 4/19/04 for plaintiff Charles Arment to obtain new counsel and notify the court of identity or whether he will represent himself. Failure to do so will result in dismissal of the case. (cc: all counsel) (caa) [Entry date 03/31/04]
3/30/04	49	ORDER by Judge Richard F. Cebull granting Patrick McGee's motion to withdraw as counsel for plaintiff. (cc: all counsel) (caa) [Entry date 03/31/04]
3/30/04	–	REMARK by clerk: Documents #48 and #49 mailed to Charles Arment at the following address: Research Air, Inc., 225 Coulee Drive, Bozeman, MT 59718. (caa) [Entry date 03/31/04]
3/31/04	–	FILE DELIVERED to motions drawer for 4/19/04 for response from plaintiff. If no response filed, deliver file to RFC for ruling. (caa)
4/8/04	50	COPY of Appellate Court Order: The petition for rehearing and suggestion for rehearing en banc is denied as untimely (crm)
4/15/04	–	FILE DELIVERED to RFC chambers for review of Petitioner's letter to 9th Cir, along with Motion to Vacate Illegal Order (poc)
4/22/04	51	Original TRANSCRIPT filed of the Prel Inj hearing held 7/24/03 before Judge Cebull in Billings, court reporter Sharon Gaughan....(ORIGINAL IN SEPARATE EXPANDO WITH FILE) (snyb) [Entry date 04/26/04]

4/26/04 – FILE DELIVERED to RFC for review (snyb)

4/27/04 – FILE DELIVERED to motions drawer for 5/15/04 for ptlf to get cnsl or send file to RWA(lm) for review (snyb)

5/20/04 52 COPY of Appellate Court Order: Petitioners motion to vacate the clerk's 4/5/04 order and file petitioners petition for rehearing and rehearing en banc is DENIED. Any request for rehearing of an order filed by a motions panel must be filed within 14 day s from the date of the motions panel Order. No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket. (ell)

5/20/04 – REMARK - Mailed document #52 to Clerk's Office in Billings. (ell)

5/21/04 – FILE DELIVERED to RFC (LM) for review (caa)

6/7/04 53 MOTION by defendants Gale A. Norton, et al to dismiss (ell) [Entry date 06/10/04]

6/7/04 54 MEMORANDUM/BRIEF by defendants Gale A. Norton, et al in support of motion to dismiss [53-1] (ell) [Entry date 06/10/04]

6/10/04 – REMARK - Mailed document #53 and 54 with copies in Red Folder to Clerk's Office in Billings. (ell)

6/15/04 – REMARK Motion/Memorandum to Dismiss (red file) delivered to RFC's chambers for review (poc)

END OF DOCKET: 2:03CV54

APPENDIX S

Excerpts from the Federal Aviation Act:

49 U.S.C. § 40101. Policy

(a) Economic Regulation.—In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity:

(1) assigning and maintaining safety as the highest priority in air commerce.

(2) before authorizing new air transportation services, evaluating the safety implications of those services.

(3) preventing deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of Congress to further the highest degree of safety in air transportation and air commerce, and to maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public.

(4) the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices.

(5) coordinating transportation by, and improving relations among, air carriers, and encouraging fair wages and working conditions.

(6) placing maximum reliance on competitive market forces and on actual and potential competition--

(A) to provide the needed air transportation system; and

(B) to encourage efficient and well-managed air carriers to earn adequate profits and attract capital, considering any material differences between interstate air transportation and foreign air transportation.

(7) developing and maintaining a sound regulatory system that is responsive to the needs of the public and in which decisions are reached promptly to make it easier to adapt the air transportation system to the present and future needs of--

(A) the commerce of the United States;

(B) the United States Postal Service; and

(C) the national defense.

(8) encouraging air transportation at major urban areas through secondary or satellite airports if consistent with regional airport plans of regional and local authorities, and if endorsed by appropriate State authorities—

(A) encouraging the transportation by air carriers that provide, in a specific market, transportation exclusively at those airports; and

(B) fostering an environment that allows those carriers to establish themselves and develop secondary or satellite airport services.

(9) preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation.

(10) avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation.

(11) maintaining a complete and convenient system of continuous scheduled interstate air transportation for small communities and isolated areas with direct financial assistance from the United States Government when appropriate.

(12) encouraging, developing, and maintaining an air transportation system relying on actual and potential competition—

(A) to provide efficiency, innovation, and low prices; and

(B) to decide on the variety and quality of, and determine prices for, air transportation services.

(13) encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry.

(14) promoting, encouraging, and developing civil aeronautics and a viable, privately-owned United States air transport industry.

(15) strengthening the competitive position of air carriers to at least ensure equality with foreign air carriers, including the attainment of the opportunity for air carriers to maintain and increase their profitability in foreign air transportation.

(16) ensuring that consumers in all regions of the United States, including those in small communities and rural and remote areas, have access to affordable, regularly scheduled air service.

(b) All-Cargo Air Transportation Considerations.—In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others and in addition to the matters referred to in subsection (a) of this section, as being in the public interest for all-cargo air transportation:

(1) encouraging and developing an expedited all-cargo air transportation system provided by private enterprise and responsive to—

(A) the present and future needs of shippers;

(B) the commerce of the United States; and

(C) the national defense.

(2) encouraging and developing an integrated transportation system relying on competitive market forces to decide the extent, variety, quality, and price of services provided.

(3) providing services without unreasonable discrimination, unfair or deceptive practices, or predatory pricing.

(c) General Safety Considerations.—In carrying out subpart III of this part and those provisions of subpart IV applicable in carrying out subpart III, the Administrator of the Federal Aviation Administration shall consider the following matters:

(1) the requirements of national defense and commercial and general aviation.

(2) the public right of freedom of transit through the navigable airspace.

(d) Safety Considerations in Public Interest.—In carrying out subpart III of this part and those provisions of subpart IV applicable in carrying out subpart III, the Administrator shall consider the following matters, among others, as being in the public interest:

(1) assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce.

(2) regulating air commerce in a way that best promotes safety and fulfills national defense requirements.

(3) encouraging and developing civil aeronautics, including new aviation technology.

(4) controlling the use of the navigable airspace and regulating civil and military operations in that airspace in the interest of the safety and efficiency of both of those operations.

(5) consolidating research and development for air navigation facilities and the installation and operation of those facilities.

(6) developing and operating a common system of air traffic control and navigation for military and civil aircraft.

(7) providing assistance to law enforcement agencies in the enforcement of laws related to regulation of controlled substances, to the extent consistent with aviation safety.

(e) International Air Transportation.—In formulating United States international air transportation policy, the Secretaries of State and Transportation shall develop a negotiating policy emphasizing the greatest degree of competition compatible with a well-functioning international air transportation system, including the following:

(1) strengthening the competitive position of air carriers to ensure at least equality with foreign air carriers, including the attainment of the opportunity for air carriers to maintain and increase their profitability in foreign air transportation.

(2) freedom of air carriers and foreign air carriers to offer prices that correspond to consumer demand.

(3) the fewest possible restrictions on charter air transportation.

(4) the maximum degree of multiple and permissive international authority for air carriers so that they will be able to respond quickly to a shift in market demand.

(5) eliminating operational and marketing restrictions to the greatest extent possible.

(6) integrating domestic and international air transportation.

(7) increasing the number of nonstop United States gateway cities.

(8) opportunities for carriers of foreign countries to increase their access to places in the United States if exchanged for benefits of similar magnitude for air carriers or the traveling public with permanent linkage between rights granted and rights given away.

(9) eliminating discrimination and unfair competitive practices faced by United States airlines in foreign air transportation, including--

(A) excessive landing and user fees;

(B) unreasonable ground handling requirements;

(C) unreasonable restrictions on operations;

(D) prohibitions against change of gauge; and

(E) similar restrictive practices.

(10) promoting, encouraging, and developing civil aeronautics and a viable, privately-owned United States air transport industry.

(f) Strengthening Competition.—In selecting an air carrier to provide foreign air transportation from among competing applicants, the Secretary of Transportation shall consider, in addition to the matters specified in subsections (a) and (b) of this section, the strengthening of competition among air carriers operating in the United States to prevent unreasonable concentration in the air carrier industry.

49 U.S.C. § 46110 Judicial review.

(a) Filing and Venue.—Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Administrator of the Federal Aviation Administration with respect to aviation safety duties and powers designated to be carried out by the Administrator) under this part may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial Procedures.—When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary or Administrator, as appropriate. The Secretary or Administrator shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of Court.—When the petition is sent to the Secretary or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary or Administrator to conduct further proceedings. After reasonable notice to the Secretary or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary or Administrator, if supported by substantial evidence, are conclusive.

(d) Requirement for Prior Objection.—In reviewing an order under this section, the court may consider an objection to an order of the Secretary or Administrator only if the objection was made in the proceeding conducted by the Secretary or Administrator or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court Review.—A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

APPENDIX T

Excerpts from the National Independent Safety Board Act:

§ 1116. Reports and Studies

(a) PERIODIC REPORTS.—The National Transportation Safety Board shall report periodically to Congress, departments, agencies, and instrumentalities of the United States Government and State and local governmental authorities concerned with transportation safety, and other interested persons. The report shall—

(1) advocate meaningful responses to reduce the likelihood of transportation accidents similar to those investigated by the Board; and

(2) propose corrective action to make the transportation of individuals as safe and free from risk of injury as possible, including action to minimize personal injuries that occur in transportation accidents.

(b) STUDIES, INVESTIGATIONS, AND OTHER REPORTS.—The Board also shall—

(1) carry out special studies and investigations about transportation safety, including avoiding personal injury;

(2) examine techniques and methods of accident investigation and periodically publish recommended procedures for accident investigations;

(3) prescribe requirements for persons reporting accidents and aviation incidents that—

(A) may be investigated by the Board under this chapter; or

(B) involve public aircraft (except aircraft of the armed forces and the intelligence agencies);

(4) evaluate, examine the effectiveness of, and publish the findings of the Board about the transportation safety consciousness of other departments, agencies, and instru-

mentalities of the Government and their effectiveness in preventing accidents; and

(5) evaluate the adequacy of safeguards and procedures for the transportation of hazardous material and the performance of other departments, agencies, and instrumentalities of the Government responsible for the safe transportation of that material.

49 U.S.C. § 1153. Judicial Review

(a) GENERAL.—The appropriate court of appeals of the United States or the United States Court of Appeals for the District of Columbia Circuit may review a final order of the National Transportation Safety Board under this chapter. A person disclosing a substantial interest in the order may apply for review by filing a petition not later than 60 days after the order of the Board is issued.

(b) PERSONS SEEKING JUDICIAL REVIEW OF AVIATION MATTERS.—

(1) A person disclosing a substantial interest in an order related to an aviation matter issued by the Board under this chapter may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60 days only if there was a reasonable ground for not filing within that 60-day period.

(2) When a petition is filed under paragraph (1) of this subsection, the clerk of the court immediately shall send a copy of the petition to the Board. The Board shall file with the court a record of the proceeding in which the order was issued.

(3) When the petition is sent to the Board, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Board to conduct

further proceedings. After reasonable notice to the Board, the court may grant interim relief by staying the order or taking other appropriate action when cause for its action exists. Findings of fact by the Board, if supported by substantial evidence, are conclusive.

(4) In reviewing an order under this subsection, the court may consider an objection to an order of the Board only if the objection was made in the proceeding conducted by the Board or if there was a reasonable ground for not making the objection in the proceeding.

(5) A decision by a court under this subsection may be reviewed only by the Supreme Court under section 1254 of title 28.

(c) ADMINISTRATOR SEEKING JUDICIAL REVIEW OF AVIATION MATTERS.—When the Administrator of the Federal Aviation Administration decides that an order of the Board under section 44709 or 46301(d)(5) of this title will have a significant adverse impact on carrying out this chapter related to an aviation matter, the Administrator may obtain judicial review of the order under section 46110 of this title. The Administrator shall be made a party to the judicial review proceedings. Findings of fact of the Board are conclusive if supported by substantial evidence.

APPENDIX U

Excerpts from the Administrative Procedure Act:

5 U.S.C. § 551 Definitions.

For the purpose of this subchapter—

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) ''sanction" includes the whole or a part of an agency -

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;
(B) withholding of relief;
(C) imposition of penalty or fine;
(D) destruction, taking, seizure, or withholding of property;
(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;
(F) requirement, revocation, or suspension of a license; or
(G) taking other compulsory or restrictive action;

5 U.S.C. § 554 ADJUDICATIONS.

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved -

(1) a matter subject to a subsequent trial of the law and the facts *de novo* in a court;
(2) the selection or tenure of an employee, except a administrative law judge appointed under section 3105 of this title;
(3) proceedings in which decisions rest solely on inspections, tests, or elections;
(4) the conduct of military or foreign affairs functions;
(5) cases in which an agency is acting as an agent for a court; or

• • •

This subsection does not apply—
(A) in determining applications for initial licenses;
(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

5 U.S.C. § 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Office of the Clerk
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
95 Seventh Street
Post Office Box 193939
San Francisco, California 94119-3939

Cathy A. Catterson
Clerk of Court

(415) 556-9800

August 7, 2003

Notice and Opportunity for Comment on Proposed Amendments to the Circuit Rules

Comments are invited on the following proposed amendments to:

No.	Circuit Rule	Title	Description
1.	C.R. 22-1	Certificate of Appealability ("COA"); Capital and Noncapital Cases; and Advisory Cmte. Note to C.R. 22-1	The proposed amendments make it clear that the Court will not grant relief on an uncertified claim without affording the respondent an opportunity to file a response. The amendments also try to clarify how a COA is processed through the court.
2.	C.R. 27-7	Delegation of Authority to Act on Motions; and Advisory Cmte. Note to C.R. 27-7	The proposed amendments are designed to conform with recent amendments to FRAP 27(b) that require a specific motion for reconsideration of a procedural order. Changes to the Advisory Committee Notes are also required to conform to these proposed amendments.
3.	C.R. 27-10	Motions for Reconsideration; and Advisory Cmte Note to C.R. 27-10	The proposed amendments are designed to have all rules dealing with motions to reconsider under one rule. Similar amendments to the Advisory Committee Note are also included.
4.	C.R. 41-2	Timing of Mandate	This new rule clarifies when the mandate issues in cases disposed of by a motions panel.

New or amended language is in bold. Comments should be submitted to Cathy A. Catterson, Clerk of Court/Circuit Court Executive, no later than ***September 19, 2003***. The full text of the proposed

amendments follows:

CIRCUIT RULE 22-1

CERTIFICATE OF APPEALABILITY; ~~CAPITAL AND NONCAPITAL CASES~~ (COA)

(a) General Procedures. ~~The procedures set forth in Fed. R. App. P. 22(b) shall apply to requests for certificates of appealability in proceedings under~~ Petitioners appealing the district court's judgment in either a 28 U.S.C. §§ 2254 and 2255 proceeding should follow the procedures set forth in Federal Rules of Appellate Procedure 4 and 22(b). A motion for a certificate of appealability ("COA") must first be considered by the district court. If the district court grants a ~~certificate of appealability~~ COA, the court ~~it~~ shall state which issue(s) or issues satisfy the standard set forth in 28 U.S.C. § 2253©)(2). The ~~C~~ court of ~~A~~ appeals will not act on a ~~request for a certificate of appealability~~ motion for a COA if the district court has not ~~first~~ ruled first ~~on the request~~.

(b) District Court Records. If the district court denies a ~~certificate of appealability in a section~~ in full in a § 2254 proceeding, the district court clerk shall forward the entire record to the court of appeals. If the district court denies a ~~certificate of appealability in a section~~ COA in full in a § 2255 proceeding, the district court clerk shall forward that portion of the record beginning with the filing of the ~~section~~ § 2255 motion.

(c) ~~Denial In Full By District Court; Motion By Petitioner Partial Grant By District Court~~. If the district court ~~denies a certificate of appealability~~ grants a COA as to all issues, a briefing schedule will be established by the court at case opening and petitioner shall brief only those issues certified or otherwise proceed according to section (e), below. ~~petitioner may, within thirty-five days of the district court's entry of its order denying a certificate of appealability, file in the court of appeals a motion for a certificate of appealability along with a statement of reasons why a certificate should issue as to any issue(s). If no motion for a certificate of appealability is filed, the court of appeals will deem the notice of appeal to constitute a request for a certificate of appealability. In either case, the respondent may file a response within thirty-five days of the notice of appeal or motion, whichever is later. In capital cases where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after the date petitioner's motion is served or, if no motion is filed, as soon as practicable after the district court's entry of its order denying a certificate of appealability.~~

(d) ~~Partial Denial By District Court; Motion By Petitioner Denial in Full By District Court~~. If the district court denies a ~~certificate of appealability in part, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants, broader certification~~ COA as to all issues, petitioner may file a motion for a COA in the court of appeals within thirty-five (35) days of the district court's entry of its order (1) denying a COA in full, or, (2) denying a timely filed post-judgment motion, whichever is later. If petitioner does not file a

COA motion with the court of appeals after the district court denies a COA motion in full, the court of appeals will deem the notice of appeal to constitute a motion for a COA. If the court appoints counsel to represent petitioner, counsel will be given additional time to file a renewed COA motion. ~~Petitioners desiring broader certification must file, in the court of appeals, a separate motion for broader certification, along with a statement of reasons why a certificate should be granted as to any issues(s) within thirty-five days of the district court's entry of it order denying a certificate of appealability. Respondent may file an opposition within thirty-five days of the date petitioner's motion is served. If a motion for broader certification is filed in a capital case where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after service of the motion. Otherwise, respondent shall file a response within thirty-five days of the date petitioner's motion is served.~~

If petitioner files a motion for a COA with the court of appeals, respondent may, and in capital cases with no pending execution date shall, file a response to the motion for a COA within thirty-five (35) days from service of the COA motion. In capital cases where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after the date petitioner's motion is served or, if no motion is filed, as soon as practicable after the district court's entry of its order denying a COA.

If, after the district court has denied a COA in full, the motions panel also denies a COA in full, petitioner, pursuant to Circuit Rule 27-10, may file a motion for reconsideration.

When a motions panel grants a COA in part and denies a COA in part, a briefing schedule will be established and no motion for reconsideration will be entertained. Petitioner shall brief only those issues certified otherwise proceed according to section (e), below.

(e) Briefing Uncertified Issues: Petitioners shall brief only issues certified by the district court or the court of appeals. Alternatively, if a petitioner concludes, during the course of preparing the opening brief, that an uncertified issue should be discussed in the brief, the petitioner shall first brief all certified issues under the heading "Certified Issues" and then, in the same brief, shall discuss any uncertified issues under the heading, "Uncertified Issues." Uncertified issues raised and designated in this manner will be construed as a motion to expand the COA and will be addressed by the merits panel to such extent as it deems appropriate. Except, in the extraordinary case, the court will *not* extend the length of the brief to accommodate uncertified issues.

(f) Response to Uncertified Issues: Respondent may, but need not, address any uncertified issues in its responsive brief. The court will afford respondent an opportunity to respond before relief is granted on any previously uncertified issue.
Cross Reference: Fed. R. App. P. 27; Cir. R. 27-1; Fed. R. App. P. 32(a)(5)(6)(7).

ADVISORY COMMITTEE NOTE TO CIRCUIT RULE 22-1

The court strongly encourages petitioner to brief only certified issues. However, if petitioner concludes that an uncertified issue should be discussed in the opening brief, petitioner shall first discuss certified issues under the heading, "Certified Issues" and then, in the same brief, shall discuss uncertified issues under the heading, "Uncertified Issues." The court may decline to address uncertified issues if they are not raised and designated as required by this Rule. ~~Motions for broader certification will be decided by motions panels. To the extent a party wishes to ask the merits panel to broaden the scope of the appeal beyond what was allowed by a motions panel of this court, such a motion and any response may be filed in the court of appeals promptly after the completion of briefing. In capital cases it is the practice of the motions panel after ruling on the request to forward automatically all papers relating to the motion to the panel ultimately assigned to consider the merits of the appeal for such consideration as that panel deems appropriate.~~

CIRCUIT RULE 27-7

DELEGATION OF AUTHORITY TO ACT ON MOTIONS

~~With the approval of the Court, the Chief Judge may delegate to the Clerk or a designated deputy clerk authority to decide motions that are subject to reconsideration by a single judge or appellate commissioner. An order issued by the Clerk or a designated deputy clerk pursuant to this rule shall be subject to reconsideration by an appellate commissioner or single judge if exception is received within 14 days after it is entered, except a prisoner not represented by an attorney shall have 28 days. (rev. 1/96)~~
The Court may delegate to the Clerk or designated deputy clerks, staff attorneys, appellate commissioners or circuit mediators authority to decide motions filed with the court. Orders issued pursuant to this section are subject to reconsideration pursuant to Circuit Rule 27-10.

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 27-7

~~(1) Motions Acted on by Clerk's Office Personnel~~

~~(a) Procedural Motions. All non-dispositive procedural motions in appeals or other proceedings that have not yet been calendared are acted on by clerk's office personnel under the supervision of the clerk or the appellate com-missioner according to guidelines adopted by the court. (Once an appeal or other proceeding has been calendared to be heard on the merits, all motions, substantive and procedural, relating to that proceeding are referred to the merits panel.) Clerk's office personnel may act on procedural motions whether opposed or unopposed, but if there is any question~~

~~*under the guidelines as to what action should be taken on the motion, it is referred to the appellate commissioner.*~~

~~*(b) Orders re; Dismissal. The Clerk is authorized to enter orders of dismissal in civil cases where the appellant or parties to an appeal or other proceeding have signed and filed with the Clerk an agreement that the proceeding be dismissed, specifying terms as to the payment of costs. (See FRAP 42 (b).)*~~

~~*(c) Motions for Clarification, Reconsideration or Rehearing. A motion for clarification, reconsideration or rehearing of an action taken by clerk's office personnel is decided by an appellate commissioner or a single judge. A motion for reconsideration of a circuit mediator's order is decided by the administrative judge for the unit from which the matter arose. (rev. 1/99)*~~

(a) Procedural Motions. Most non-dispositive procedural motions in appeals or other proceedings that have not yet been calendared are acted on by court staff under the supervision of the clerk, the appellate commissioner, or the chief circuit mediator. Court staff may act on procedural motions whether opposed or unopposed, but if there is any question under the guidelines as to what action should be taken on the motion, it is referred to the appellate commissioner or the chief circuit mediator. Through its General Orders, the court has delegated authority to act on specific motions and to take other actions on its behalf. See, in particular, General Orders, Appendix A, (which are available on the court's website).

CIRCUIT RULE 27-10

MOTIONS FOR RECONSIDERATION

(a) **Filing for Reconsideration**

Unless the time is shortened or enlarged by order of this court, a motion for clarification; or reconsideration~~, or rehearing~~ of an court order **must be filed within fourteen (14) days of the date of the order,** ~~entered by a motions panel must be filed within 14 days of the date of the order;~~ except a prisoner not represented by an attorney shall have 28 days.

~~A motion for clarification, reconsideration or rehearing of an order issued by an appellate commissioner shall be decided by a motions panel unless the appellate commissioner grants reconsideration of the order. Such a motion must be filed within 14 days from entry of the appellate commissioner's order, except that a prisoner not represented by an attorney shall have 28 days.~~

A party seeking relief under this rule shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misunderstood. Changes in legal or factual circumstances which may entitle the movant to relief also shall be stated with particularity.

(b) **Court Processing**

~~No answer to a motion will be filed unless requested by the court, but ordinarily the court will not grant a motion without such a request.~~

~~A party may file only one motion for clarification, reconsideration or rehearing of an order entered by a motions panel. (Rev. 7/1/2000)~~

A timely motion for clarification or reconsideration of an order issued by a motions panel shall be decided by that panel. If the case subsequently has been assigned to a merits panel, the motions panel shall contact the merits panel before disposing the motion. A party may file only one motion for clarification or reconsideration of a panel order. No answer to such a motion will be filed unless requested by the court, but ordinarily the court will not grant such a motion without requesting an answer. This rule applies to any motion seeking review of a motions panel order, either by the panel or en banc, and supersedes the time limits set forth in Fed. R. App. P. **40(a)(1) with respect to such motions.**

A motion to reconsider an order issued pursuant to Circuit Rule 27-7 by a deputy clerk, staff attorney, circuit mediator, or appellate commissioner is initially directed to the individual who issued the order. If that individual is disinclined to grant the requested relief, the motion for reconsideration shall be processed as follows:

(1) if the order was issued by a deputy clerk or staff attorney, the motion is referred to an appellate commissioner;

(2) if the order was issued by a circuit mediator, the motion is referred to the chief circuit mediator;

(3) if the order was issued by an appellate commissioner or the chief circuit mediator, the motion is referred to a motions panel.

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 27-10

Motions for clarification, reconsideration or rehearing of orders entered by a motions panel are not favored by the Court and should be utilized only where counsel believes that the Court has overlooked or misunderstood a point of law or fact, or where there is a change in legal or factual circumstances after the order which would entitle the movant to relief.

~~*Motions for clarification, reconsideration or rehearing of orders issued pursuant to FRAP 27(b) and Ninth Circuit Rule 27-7 are subject to the reconsideration provisions of Ninth Circuit Rule 27-7.*~~

P-R-O-P-O-S-E-D

CIRCUIT RULE 41-2

TIMING OF MANDATE

In cases disposed of by an order of a motions panel, a mandate will issue seven (7) calendar days after the time to file a motion for reconsideration or rehearing expires pursuant to Ninth Circuit Rule 27-10, or seven (7) calendar days after entry of an order denying a timely motion for such relief, whichever is later.
Cross Reference: 9th Cir. R. 27-10; Fed. R. App. P. 35(c); 40(a)(1)

APPENDIX W

EXCERPT FROM LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

83.3 ADMISSION TO AND PRACTICE IN THIS COURT.

(a) Admission to the Bar of this Court. Admission to the Bar of this Court is limited to attorneys of good moral character who are members in good standing of the State Bar of Montana.

(b) Procedure for admission. Each applicant for admission shall present to the clerk a written petition for admission, stating the applicant ¡s residence and the date of admission to the State Bar of Montana. The petition shall be accompanied by a certificate of a member of the Bar of this Court that the applicant is of good moral character and a member in good standing of the State Bar of Montana. Upon qualification, the applicant may be admitted, upon oral motion or without appearing, as determined by the Court, by signing the prescribed oath and paying the prescribed fee.

(c) Practice in this Court. Except as otherwise provided in this Rule, only members of the Bar of this Court shall practice in this Court.

(d) Attorneys for the United States. An attorney who is not eligible for admission under L.R. 83.3(a) but who is a member in good standing of and eligible to practice before the Bar of any United States Court or of the highest court of any state, or of any territory or insular possession of the United States, and who is of good moral character, may practice in this Court in any matter in which that attorney is employed or retained by the United States or its agencies and is representing the United States or any of its officers. Attorneys so permitted to practice in this Court are subject to the jurisdiction of the Court with respect to their conduct to the same extent as members of the Bar of this Court.

(e) *Pro hac vice.*

(1) An attorney not eligible for admission under L.R. 83.3(a), but who is a member in good standing of and eligible to practice before the Bar of any United States Court or of the highest court of any state or of any territory or insular

possession of the United States, who is of good moral character, and who has been retained to appear in this Court, may, upon written application to and in the discretion of the presiding judge, be permitted to appear and participate in a particular case.

(2) Unless authorized by the Constitution of the United States or acts of Congress, an attorney is not eligible to practice pursuant to this subsection if

(A) the attorney resides in Montana, or

(B) the attorney is regularly employed in Montana.

(3) Application to appear pro hac vice shall be filed and served on all parties, and shall state, under penalty of perjury:

(A) the attorney's state or territory of residence and office addresses;

(B) by what court(s) the attorney has been admitted to practice, the date(s) of admission, and the date(s) of termination of admission, if any;

(C) that the attorney is in good standing and eligible to practice in these courts;

(D) that the attorney is not currently suspended or disbarred in any other court,

(E) whether the attorney has ever been held in contempt, otherwise disciplined by any court for disobedience to its rules or orders, or sanctioned under Federal Rules of Civil Procedure 11 or 37(b), (c), (d) or (g) or their state equivalent; the name of the court before which the proceedings were conducted; the date of the proceedings; and what action was taken in connection with those proceedings. A copy of any such contempt, discipline, or sanction order must be attached to the application;

(F) if the attorney has concurrently or within the year preceding the date of application made any pro hac vice application to this Court, the title and the cause

number of each matter in which an application was made, the date of application, and whether or not the application was granted; and

(G) the name, address, telephone number, and written consent of local counsel who is a member of the Bar of this Court and with whom the Court and opposing counsel may readily communicate regarding the conduct of the case, upon whom papers shall be served, and who will be responsible to participate as required under subsection (f) of this Rule.

(f) Duties of local counsel. Unless otherwise ordered, local counsel designated pursuant to this Rule shall sign all pleadings, motions and briefs. In all cases, local counsel shall participate actively in all phases of the case, including, but not limited to, attendance at depositions and court proceedings, preparation of discovery responses and briefs, and all other activities to the extent necessary for local counsel to be prepared to go forward with the case at all times. The Court, upon motion by local counsel, may waive this Rule on a showing of extraordinary circumstances. Upon waiver of this Rule by the Court, all papers subsequently filed shall be signed by counsel actively involved in the case. Such a waiver is not to be routinely granted.

APPENDIX X

NINTH CIRCUIT RULE 27-10

(a) Filing for Reconsideration.

Unless the time is shortened or enlarged by order of this court, a motion for clarification, or reconsideration of a court order must be filed within fourteen (14) days of the date of the order, except a prisoner not represented by an attorney shall have twenty-eight (28) days. (rev. 1-1-04) A party seeking relief under this rule shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misunderstood. Changes in legal or factual circumstances which may entitle the movant to relief also shall be stated with particularity.

(b) Court Processing

A timely motion for clarification or reconsideration of an order issued by a motions panel shall be decided by that panel. If the case subsequently has been assigned to a merits panel, the motions panel shall contact the merits panel before disposing the motion. A party may file only one motion for clarification or reconsideration of a panel order. No answer to such a motion will be filed unless requested by the court, but ordinarily the court will not grant such a motion without requesting an answer. The rule applies to any motion seeking review of a motions panel order, either by the panel or en banc, and supersedes the time limits set forth in Fed. R. App. P. 40(a)(1) with respect to such motions. (new 1-1-04) A motion to reconsider an order issued pursuant to Circuit Rule 27-7 by a deputy clerk, staff attorney, circuit mediator, or appellate commissioner is initially directed to the individual who issued the order. If that individual is disinclined to grant the requested relief, the motion for reconsideration shall be processed as follows: (new 1-1-04)

(1) if the order was issued by a deputy clerk or staff attorney, the motion is referred to an appellate commissioner;
(2) if the order was issued by a circuit mediator, the motion is referred to the chief circuit mediator;
(3) if the order was issued by an appellate commissioner or the chief circuit mediator, the motion is referred to a motions panel.

APPENDIX Y

NINTH CIRCUIT ADVISORY COMMITTEE NOTE TO RULES 21-1-4

A petition for writ of mandamus, writ of prohibition or other extraordinary relief is processed by the clerk and motions attorneys in the same fashion as a motion. If the panel does not believe that the petition makes a prima facie showing justifying issuance of the writ, it will deny the petition forthwith. That denial is not regarded as a decision on the merits of the claims. In other instances, the panel will direct that an answer and reply may be filed within specified times. The panel may also issue a stay or injunction pending further consideration of the petition. After receipt of the answer and reply, or expiration of the times set therefor, the matter is then forwarded to a new motions panel unless the first panel directs other-wise. The panel may grant or deny the petition or set it for oral argument. If the panel decides to set the petition for argument, it may be calendared before a regular panel of the Court or before the motions panel. (Rev. 7/1/2000)

In emergency circumstances, an individual judge may grant temporary relief to permit a motions panel to consider the petition, may decline to act, or may order that an answer be filed. If the judge determines that immediate action on the merits is necessary, the judge will contact the members of the court currently sitting as a motions panel until two or more judges can consider whether to grant or deny the petition. Except in extreme emergencies, the judges will not grant a petition without calling for an answer to the petition. (Rev. 7/1/2000)

APPENDIX Z

NOTES OF ADVISORY COMMITTEE ON RULES, 1994 AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE RULE 40

Subdivision (a). The amendment lengthens the time for filing a petition for rehearing from 14 to 45 days in civil cases involving the United States or its agencies or officers. It has no effect upon the time for filing in criminal cases. The amendment makes nationwide the current practice in the District of Columbia and the Tenth Circuits, see D.C. Cir.R. 15(a), 10th Cir.R. 40.3. This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing. In a case in which a court of appeals believes it necessary to restrict the time for filing a rehearing petition, the amendment provides that the court may do so by order. Although the first sentence of Rule 40 permits a court of appeals to shorten or lengthen the usual 14 day filing period by order or by local rule, the sentence governing appeals in civil cases involving the United States purposely limits a court's power to alter the 45 day period to orders in specific cases. If a court of appeals could adopt a local rule shortening the time for filing a petition for rehearing in all cases involving the United States, the purpose of the amendment would be defeated.

APPENDIX AA

28 U.S.C. § 1657, PRIORITY OF CIVIL ACTIONS

(a) Notwithstanding any other provision of law, each court of the United States shall determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of any action brought under chapter 153 or section 1826 of this title, any action for temporary or preliminary injunctive relief, or any other action if good cause therefor is shown. For purposes of this subsection, ''good cause'' is shown if a right under the Constitution of the United States or a Federal Statute (including rights under section 552 of title 5) would be maintained in a factual context that indicates that a request for expedited consideration has merit.